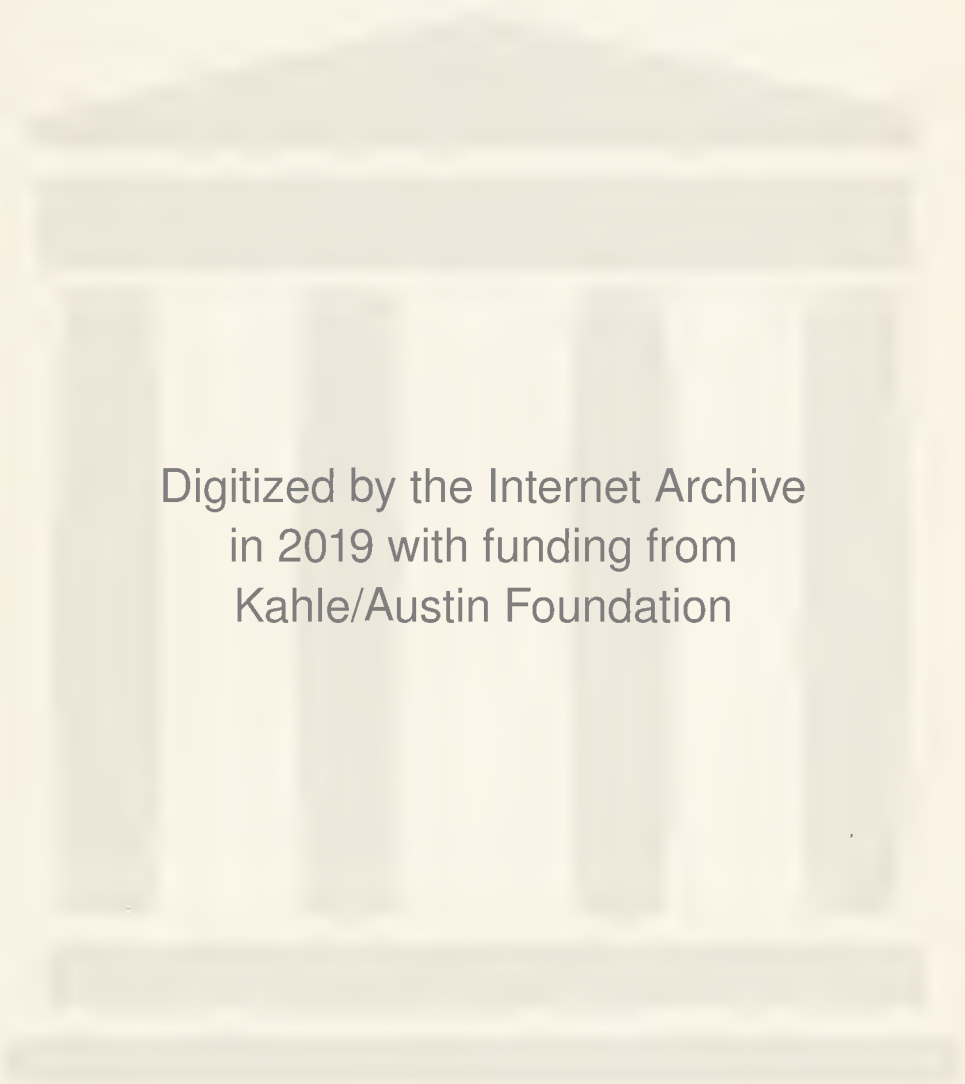

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CONTENTS

CANADA'S TITLE TO HUDSON BAY AND HUDSON STRAIT

V. KENNETH JOHNSTON, M.A., Ph.D., OF OSGOODE HALL, TORONTO, BARRISTER AT LAW

THE eastern, southern, and western shores of Hudson Bay are Canadian territory. At the north the geographical mouth of Hudson Bay is filled with Canadian-owned islands. Baffin Island, which forms the northern shore of Hudson Strait, is hinged like a lid on the Melville Peninsula, and, considering the narrowness of Fury and Hecla Strait, would, but for that strait, form a part of and be joined to the North American continental mass. Baffin Island is Canadian territory, its southern shore line being the northern shore line of Hudson Strait. The southern shore line of Hudson Strait is the Ungava Peninsula, which is Canadian territory. All the land circumjacent to Hudson Bay and Hudson Strait is Canadian-owned.

Hudson Strait is a channel from the Atlantic into Hudson Bay, some five hundred miles in length, the eastern entrance being thirty-five miles in width and the western forty-five miles. Hudson Bay extends south into the continental mass over one thousand miles and at its widest point is some six hundred miles wide.

Navigation into and out of Hudson Bay can only be achieved through Hudson Strait, for navigation through the Canadian-owned Arctic Islands, from the western Arctic Ocean, is a practical impossibility. Hudson Strait is consequently the practicable and the only entrance to Hudson Bay—and, if Baffin Island is viewed as a lid over Hudson Bay, Hudson Strait becomes in effect the elongated mouth of Hudson Bay and a geographical part of the Bay.

These two large bodies of water, though surrounded by Canadian territory, have been and are generally assumed to be parts of the open sea, free to the navigation and fishing of all nations, except for the three-mile maritime strip along the shores. From de Vattel, following the principles enunciated by Grotius and Bynkershoek, down through the eighteenth, nineteenth, and twentieth centuries, it seems generally to have been assumed, by publicists and statesmen, that the large and extensive waters of Hudson Bay and Hudson Strait were open sea, clearly incapable of appropriation by the adjacent state.[1]

[1] For a collection of opinions based on and affirming this assumption see T. W.

In 1906, however, notwithstanding the assumptions of the world as to the status of Hudson Bay, the Government of Canada placed on its statute books a statute declaring the waters of Hudson Bay to be territorial waters of Canada.[1] That statute is still in force in Canada, without, so far as is known, any protest having been made by any foreign government. This statute has been and presumably still is being actively enforced in Canada and in Hudson Bay as part of Canada.[2] The Government of Canada, therefore, has appropriated and continues to appropriate Hudson Bay and presumably Hudson Strait as Canadian national waters, as much a part of Canada as Toronto or Montreal. Furthermore, Canada's predecessor in title to this whole area, the Hudson's Bay Company, maintained for a century and a half exclusive title and possession, not only to the territories surrounding the Bay and Strait, but also to the Bay and the Strait.

The general rule of International Law as to the appropriation of gulfs and bays as national waters is that gulfs and bays, surrounded by the territory of one state, whose openings toward the sea exceed six (or ten) miles in width, are outside the maritime domain of the state which holds the coast land.[3] Hudson Bay and Hudson Strait are surrounded by Canadian territory, but the mouth of Hudson Bay, whether that mouth be located on a line

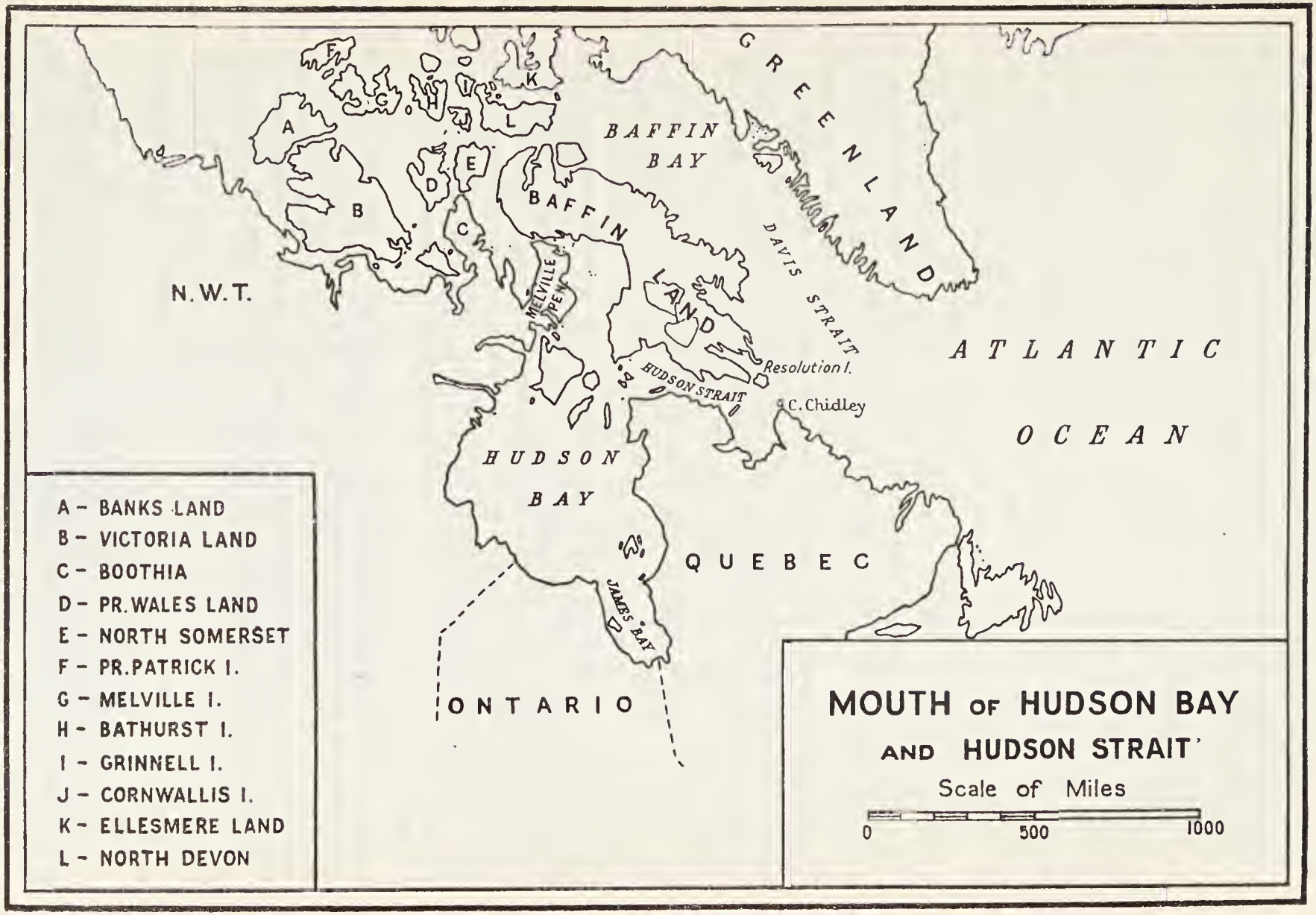
Balch, "Is Hudson Bay a Closed or an Open Sea?" in *American Journal of International Law*, Vol. VI (1913), pp. 409–59, at pp. 416–24. This article was also published in *Revue de droit international et de législation comparée*, Brussels, 2nd series, Vol. XIII, pp. 539–86.

[1] *R.S.C. 1927*, cap. 73, sec. 9, sub-sec. 10; *Statutes of Canada, 1906*, cap. 45, sec. 9 (12).

[2] See *Cruise of the Arctic 1908–9*, at p. 273. *Postea*, p. 15, n. 8.

[3] See Balch, *l.c.*, at pp. 414–24 and the very full and complete references and citations there made on the development and settlement of this rule. The rule as stated by Wilson on *International Law* (Hornbook series), 2nd ed., at p. 76, is: "Gulfs and bays and other arms of the sea, whose openings toward the sea do not exceed six miles in width are uniformly regarded as within the maritime domain of the state which holds the coast land. There are various claims to more extended domain." In the judgment in *Direct U.S. Cable Co.* v. *Anglo-American Telegraph Co.*, [1877] L.R. 2 A.C. at p. 419 the Judicial Committee of the Privy Council on this point stated: "Passing from the common law of England to the general law of nations as indicated by the text writers on the international jurisprudence, we find a universal agreement that harbours, estuaries, and bays landlocked belong to the territory of the nation which possesses the shores round them, but no agreement as to what is the rule to determine what is 'bay' for this purpose.

"It seems generally agreed that, where the configuration and dimensions of the bay are such as to show that the nation occupying the adjoining coasts, also occupies the bay, it is part of the territory, and, with this idea, most of the writers on the subject refer to defensibility from the shore as the test of occupation; some suggesting, therefore, a width of one cannon shot from shore to shore or three miles; some a cannon shot from each shore or six miles; some, an arbitrary distance of ten miles."


A - BANKS LAND
B - VICTORIA LAND
C - BOOTHIA
D - PR. WALES LAND
E - NORTH SOMERSET
F - PR. PATRICK I.
G - MELVILLE I.
H - BATHURST I.
I - GRINNELL I.
J - CORNWALLIS I.
K - ELLESMERE LAND
L - NORTH DEVON
BAFFIN BAY
GREENLAND
BAFFIN
DAVIS STRAIT
N.W.T.
MELVILLE PEN.
LAND
Resolution I.
HUDSON STRAIT
C. Chidley
ATLANTIC
OCEAN
HUDSON BAY
QUEBEC
JAMES BAY
ONTARIO
MOUTH OF HUDSON BAY
AND HUDSON STRAIT
Scale of Miles
0
500
1000

from Cape Digges to Melville Peninsula or at either of the entrances to Hudson Strait, exceeds six (or ten) miles in width, and therefore, on the general rule of International Law alone, Hudson Bay is not within the maritime domain of Canada.

Although the general rule is as stated and, taken alone, operates to make Hudson Bay and Strait open seas, yet that general rule is subject to exceptions[1] in particular cases, such for example as Conception Bay in Newfoundland,[2] Delaware and Chesapeake Bays in the United States,[3] the White Sea in Russia,[4] the Inland Sea of Japan,[5] and other smaller bays.[6] These, like Hudson Bay, have mouths wider than ten miles; yet, like Hudson Bay, they are sur-

[1] See Hall's *International Law*, 8th ed., pp. 193–7 at p. 196: Comment and summary of North Atlantic Coast Fisheries Arbitration 1910—". . . the Hague Tribunal rejected the argument of the United States that the alleged three-mile limit was, as a rule of international law, applicable to bays, and that a bay ceased to be territorial if it exceeded six miles *inter fauces terrae*. The Tribunal's reasons material to the present purpose were: (1) The geographical character of a bay contains conditions which concern the interests of the territorial sovereign to a more intimate and important extent than do those connected with the open coast, e.g. conditions of national and territorial integrity, defence, commerce, industry; (2) the opinions of jurists and publicists show that, speaking generally, the three-mile limit should not be strictly and systematically applied to bays." Also see Balch, *l.c.*, at p. 427 *et seq.*

[2] In the judgment in *Direct U.S. Cable Co.* v. *Anglo-American Telegraph Co.* (*supra*) the Judicial Committee stated with reference to Conception Bay, "That in point of fact, the British Government has for a long period exercised dominion over this bay, and that their claim has been acquiesced in by other nations, so as to show that the bay has been for a long time occupied exclusively by Great Britain, a circumstance which in the tribunals of any country would be very important. And moreover (which in a British tribunal is conclusive) the British legislature has by Acts of Parliament declared it to be part of the British territory and part of the country made subject to the legislature of Newfoundland." See comments of Balch, *l.c.*, at pp. 451, 452. Holland's criticism, as cited approvingly by Balch, of the international validity of this decision of the Privy Council as to Conception Bay, may have been and may be technically correct, but note the first sentence of the above quotation from the judgment of the Judicial Committee.

[3] See Chas. G. Fenwick on *International Law*, 1924 (Century Co.), p. 257, citing Moore, *Digest*, I, sec. 153 and Moore, *Arbitrations*, IV, sec. 4332. Also see Hershey, *Essentials of International Public Law and Organization*, 1927 (Macmillan Co.), p. 302, n. 14. Balch, *l.c.*, at p. 428 *et seq.* shows that it was in the immediate self-interest of both France and Great Britain to induce the appropriation by the United States of both Delaware and Chesapeake Bays in 1793 and 1862. But it was not at all in the immediate self-interest of France in 1713 by the Treaty of Utrecht to relinquish her claims to the Hudson Bay area to Great Britain, the only other claimant. See *postea*, p. 6, n. 1.

[4] See Hershey, *Essentials*, *supra*, p. 302, n. 14, citing *Revue général de droit international public*, Vol. XVIII (1911), pp. 94–9.

[5] See Fenwick, *International Law*, *supra*, p. 258, n. 3.

[6] See Hall's *International Law*, 8th ed., pp. 193–7. As to the Bay of Cancale, discussed by Balch, *l.c.*, at p. 454, note the comment of Hall's *International Law*, 8th ed., p. 194, note, "the cultivation of the (oyster) beds (of the Bay of Cancale) by the local French fishermen, renders the case exceptional".

rounded by the territory of one state; that one circumjacent state has assumed title to and possession over them for a long period of time, that is, has occupied them for a long period of time, and the respective claims to title by the circumjacent state have been acquiesced in by other nations over a long period of time. Whether Hudson Bay could be, and has actually been, made one of the exceptions to the general rule of international law, depends on the evidence of occupation by Canada and on the evidence of acquiescence in that occupation by other states. That evidence of occupation and of acquiescence is to be obtained from the history of Hudson Bay.[1]

The history of Hudson Bay begins in 1610 when Henry Hudson, a British navigator, first explored the Bay.[2] This voyage was followed up by British exploring expeditions, the next being led by Button in 1612.[3] In 1619 Munk of Denmark led an expedition into the Bay.[4] In 1668 Gillam and Grosseliez, leading a British expedition, sailed through Hudson Bay and entered the mouth of the Rupert River on James Bay, where they built a stone fort, naming it Fort Charles.[5] Two years later, in 1670, the English Government, by grant to the Hudson's Bay Company, assumed possession of, and title to, Hudson Bay and the territories surrounding Hudson Bay.

By the charter of the Hudson's Bay Company, the British Crown granted to the Company all waters, lands, &c., within the entrance to Hudson Strait, not possessed by any foreign state or other British company or colony.[6] The entrance to Hudson Strait lies between Resolution Islands, at the south-east point of Baffin Island, and Cape Chidley, on the north-west corner of the Ungava Peninsula. The territory thus granted to the Hudson's Bay Company and described as within the entrance to Hudson Strait was later named Rupert's Land, and was described by the Company as including all that territory, in North America and the Arctic Islands, drained by rivers flowing into Hudson Bay.[7] Since, by the charter, all seas, lakes, &c., within the entrance to Hudson Strait were granted to the Company, and since all the waters of Hudson

[1] See Balch, *l.c.*, part III at p. 450 to end of article, for a discussion of the historic bay principle as applied to Hudson Bay.

[2] Barrow, *Voyages into the Arctic Regions*, pp. 187–95.

[3] *Ibid.*, pp. 235–43. [4] *Ibid.*, pp. 243–52. [5] *Ibid.*, pp. 254–61.

[6] Schooling, Sir W., *The Hudson's Bay Company*, pp. 1–5, at p. 5.

[7] *Report from the Select Committee on the Hudson's Bay Company*, Minutes of Evidence, Examination of Sir G. Simpson, February 26, 1857, Questions nos. 737, 738, 739, 740, 741, 742, p. 46.

Bay and Hudson Strait lay within the entrance to Hudson Strait, the British Crown, therefore granted to the Company title to both Hudson Bay and Hudson Strait, provided, however, no prior foreign or British claim had been established thereto.

In 1670 no other British colony could have claimed title as far north as Hudson Bay. France, however, in 1670 could claim and did claim, through New France, title to the whole area. Following 1670 France and England disputed possession of Hudson Bay and its shore-line, until, in 1713, by the Treaty of Utrecht, France relinquished her claim to the area to Great Britain.[1] Thereby the international validity of the British grant of 1670 to the Hudson's Bay Company was established. After 1713, until the middle of the nineteenth century, the Hudson's Bay Company, under the British Crown, remained in undisputed possession of, and held an undisputed title to, Hudson Bay and Strait and the territories surrounding Hudson Bay and Strait.

In the period from 1713 to 1870, when Rupert's Land was purchased by Canada from the Hudson's Bay Company, the treaties which might have mentioned or did mention Hudson Bay and Strait and Rupert's Land were those of 1763 between Great Britain and France, of 1783 between Great Britain and the United States, and of 1818 between Great Britain and the United States.

The treaty of 1763 between Great Britain and France made no reference to Hudson Bay and Strait, or Rupert's Land, since France had, fifty years before, abandoned any claim she might have had in or to the region.

In the treaty of 1783, and in the negotiations between the plenipotentiaries, no mention was made of Hudson Bay and Rupert's Land, though Canada, and practically every British possession adjoining the Thirteen Colonies, was at one time demanded by Franklin as a necessary condition of permanent peace.[2]

The treaty of 1818, between Great Britain and the United States, did, however, mention the Hudson's Bay Company and its territories, but mentioned them only to exclude them from the operation of the treaty. By the treaty of 1818, citizens of the United States were granted the privilege of fishing along the coasts of Labrador indefinitely northwards, but "without prejudice

[1] Treaty of Utrecht, article 10. Copy in *Collection of Treaties, &c. between Great Britain and other Powers*, London, J. Almon, 1772, Vol. I, p. 107, at p. 136.

[2] *F.O. 27*, Vol. 2, pp. 371–8. Also in *F.O. Misc. 95*, Vol. 511. Letter from Richard Oswald dated Paris, Wed., July 10, 1782.

however to any of the exclusive rights of the Hudson's Bay Company".[1]

This exception to the fishing privileges granted citizens of the United States by the treaty of 1818, was interpreted by the United States' negotiators of the treaty, in an unpublished dispatch to the United States' Secretary of State, in these words:

"To the exception of the exclusive rights of the Hudson's Bay Company, we did not object as it was virtually implied in the treaty of 1783 and we had never, any more than British subjects, enjoyed any right there, the Charter of that Company having been granted in the year 1670. The exception applies only to the coasts and their harbours and does not affect the right of fishing in Hudson's Bay beyond three miles from the shores, a right which could not exclusively belong to or be granted by any nation."[2]

This dispatch from the United States' negotiators to the United States' Secretary of State has been, in some quarters, accepted and treated as a caveat against any British claim to jurisdiction in and over the whole of Hudson Bay and Strait. That it is not, and cannot be, considered in the nature of a caveat, is clear from the fact that, when made, immediately after the treaty of 1818, it was not communicated to the other party to the treaty. In the second place, if it might be considered as a caveat, it was of no effect, for, in 1818, the Hudson's Bay Company, under the British Crown, had exclusive possession of the Bay and Strait, had exclusive jurisdiction, under the British Crown, in and over the Bay and Strait, and held that exclusive possession and jurisdiction from the British Crown, which had attained international title thereto in 1713; the Hudson's Bay Company, in short, had maintained British possession of the Bay and Strait under international title for over one hundred years at the time when Messrs. Gallatin and Rush attempted to controvert its right to such possession and jurisdiction. In the third place, if it might be considered as a caveat, it was of no effect, for the treaty of 1818, article I, granted to United States' citizens privileges in common with British subjects, in certain British northern areas except those British areas under the Hudson's Bay Company; since British subjects, in 1818, and for many years thereafter, were prohibited from fishing and whaling in those waters, United States' citizens could not have been granted any rights therein "in common" with British subjects. If the uncommunicated dispatch of Messrs. Gallatin and Rush is to be, or may

[1] Art. I, Treaty of 1818. *Treaties and Agreements with the U.S. affecting Canada* (1925), p. 15.

[2] *U.S. State Papers*, Vol. VII (1818–19), p. 167. Dispatch no. 50, Gallatin and Rush to Secretary of State Adams, dated London, October 20, 1818.

at any time be, propounded as a caveat against any British claim to jurisdiction in and over Hudson Bay and Strait, it would seem that that caveat of 1819 could have little or no effect.

The Hudson's Bay Company's exclusive possession and use of Hudson Bay continued from 1713 through the remainder of the eighteenth century and on into the nineteenth[1] until about 1859, when certain United States' whalers from New England began whaling in Hudson Strait and Hudson Bay, and continued so to do until about 1895 when their establishments were purchased by certain Scotch whaling companies also operating in the Bay and Strait.[2] Whether these United States' whalers operated in Hudson Bay as of right or as licensees of the Hudson's Bay Company has been difficult to ascertain. Manifestly they operated from stations on British territory, for Marble Island, one of their whaling stations,[3] was undoubtedly British or Canadian territory. Prior to 1857 the Hudson's Bay Company had jealously protected their preserves against "interlopers"; in 1857 the Parliamentary Committee's investigation of the Hudson's Bay Company had foreshadowed great changes in its exclusive rights in the region, with the result that the Hudson's Bay Company saw little advantage to itself in maintaining, and so neglected to maintain, its rights in full vigour. The Company knew of United States' whalers being in the Strait and in the Bay, even dispatching a whaler to investigate the whaling possibilities of the Bay.[4] The Hudson's Bay

[1] See "Arrivals and Departures of Ships, Moose Factory, Hudson Bay, Province of Ontario", by J. B. Tyrrell, M.A., F.R.S.C., in *Ontario Historical Society, Papers and Records*, Vol. XIV.

[2] Report of the expedition to Hudson's Bay, &c., in the Steamship *Diana* under the command of William Wakeham, Department of Marine and Fisheries in the year 1897. *Sessional Papers, Canada*, 1898, no. IIB, pp. 74–5.

[3] Also at Whale Point and on the shores of Repulse Bay in Sir Thomas Roe's *Welcome*. *Ibid.*, p. 74.

[4] Hudson's Bay Company to Chief Trader J. W. Wilson at York Factory, June 27, 1866: "You mention in your letter that Chief Trader Griffin in charge at Churchill had reported that the Esquimaux in that vicinity had fallen in with vessels supposed to be Americans which had wintered to the northward of his post. The Governor and Committee have obtained information which confirms Mr. Griffin's report and which moreover proves to them that not only have the American whalers been for some years past wintering in the Hudsons Bay and employing themselves in whale fishing but that they have been making considerable progress in establishing a trade with the Esquimaux. They are consequently of the opinion that the time has arrived when such proceedings should be checked and with that view they have fitted out the "Ocean Nymph" as a whaler, putting her in charge of Captain James Taylor who has been directed to proceed to Churchill in the first instance where it is hoped that Governor Mactavish will have sent a trader and an Esquimaux Interpreter to join the vessel. Herewith I enclose a copy of Captain Taylors instructions as the best means of explaining the

Company in fact took no active steps to exclude United States' whalers from the Bay and the Strait;[1] a few years later, Scotch whalers began whaling in the region, and in the 'nineties bought out the United States' whalers and whaling stations.[2] After 1900 United States' whalers and fishermen did not enter Hudson Bay or Hudson Strait.[3]

This use of the waters of Hudson Bay and Hudson Strait by United States' whalers might seem to negative any British or Canadian claim that title to the Bay and Strait had been acquired, if it were not for the fact that these United States' whalers worked from stations on British territory and, in fact, were able to carry on their operations only by using British territory for winter quarters. The points whether British title to Hudson Bay and Hudson Strait had been acquired and whether the United States' whalers were licensees therein may be put to one side, for the point that these United States' whalers operated from British territory, and could operate only by using British territory, makes of them licensees or tenants in the region; they could not be trespassers or "interlopers" for they operated with the knowledge and assent of those who might have excluded them from British territory. Since the United States' whalers cannot be considered as trespassers or interlopers, they might, perhaps, in terms of real property law, be described as "tenants at will".

objects of his expedition, and I am directed to express a hope that you will do all that may fall within your province to make the expedition a successful one."

Hudson's Bay Company to Captain James Taylor of the *Ocean Nymph*, June 27, 1866 (On Whaling Expedition): "It is most desirable that you should not come in direct contact with the American whalers who have been in the habit of wintering for some years past in the northern part of Hudsons Bay, but if you happen to fall in with them you will endeavour to obtain every information as to the localities in which they have seen whales and as to any other points which you may consider valuable to the Company. You will be particularly careful not to lay your vessel up near their winter quarters in order to avoid disputes and annoyance between them and your officers and crews."

[1] Captain James Taylor of the *Ocean Nymph* (Churchill) to Captain Herd, August 15, 1866: "We saw three American whalers in the Straits. I boarded one of them he was bound to Marble Island. He had been there last year and got full I think. He reported ten others going there and two steamers. So we will be surrounded with them. The name of the vessel I boarded was the Orray Taft of New Bedford Captain Parker. I think he is part owner, he says there is only two harbours along the coast, one at Marble Island and the other near Cape Fullerton, he likewise said that some of the other whalers was going to try to get in Foxes Channel if they could. I believe it is hard to get through the Frozen Straits for ice. Most likely we will try up that way next summer if we can not succeed to the southward. I think if we can get the Esquimaux we will stand as good a chance as the others."

[2] Wakeham Report, *supra*, *Sessional Papers Canada*, 1898, no. IIB, p. 75.

[3] *Ibid.*

Whatever may be the effect of American whalers' use of the waters of Hudson Bay and Hudson Strait, between 1859 and 1900, on any British or Canadian claim to the title to Hudson Bay and Strait, the fact remains that the Hudson's Bay Company from 1713 to 1857 maintained its exclusive right to Hudson Strait and Hudson Bay, and to the territories surrounding them, both on the continent and in the Arctic Islands. All the territory drained by rivers flowing into Hudson Bay and Hudson Strait was named Rupert's Land, and this huge territory as well as the North-West Territory, which lay west and north of Rupert's Land, was purchased in 1870 from the Hudson's Bay Company, through the Crown, by the newly formed Dominion of Canada.[1] In 1880, by Imperial Order in Council, all British territory in North America adjacent to Canada, except Newfoundland and Labrador, was transferred to the Dominion of Canada.[2] This Order in Council of 1880 was, in 1895, confirmed by Imperial statute.[3] After 1880, therefore, Canada held whatever title Great Britain possessed, not only to the territories surrounding Hudson Bay and Strait, but also to the Bay and the Strait.

In the transfer of 1870, the Hudson's Bay Company first surrendered to the British Crown "all the lands and territories within Rupert's Land granted or purported to be granted" to the Company by the charter of 1670;[4] whereupon, under the authority of the "Rupert's Land Act of 1868",[5] by Imperial Order in Council,[6] Rupert's Land was admitted into, and became part of, the Dominion of Canada. Rupert's Land, according to the Governor of the Hudson's Bay Company, before the Parliamentary Committee of 1857, included all territories drained by rivers flowing into Hudson Bay and Hudson Strait, that is, those parts of the continent and those Arctic Islands surrounding the Bay and the Strait.[7] Since Rupert's Land included all the land and islands surrounding Hudson Bay and Hudson Strait, and since, in 1870, Rupert's Land became part of Canada, therefore, after 1870, Canadian territory surrounded Hudson Bay and Hudson Strait. In short, Hudson Bay and Hudson Strait, after 1870, were geographically embraced

[1] Documents in *Statutes of Canada, 1872*, pp. lxiii–lxxxiii.

[2] Copy in *Statutes of Canada, 1880*, p. iii.

[3] 58–9 Victoria, cap. 34 (Imperial).

[4] Deed of Surrender, H.B. Co. to the Crown, in *Statutes of Canada, 1872*, pp. lxxvii–lxxxiii.

[5] 31–2 Victoria, cap. 105 (Imperial). *Statutes of Canada, 1869*, p. iii.

[6] O. in C. June 23, 1870; *Statutes of Canada, 1872*, p. lxiii.

[7] *Supra*, p. 5, n. 7.

by Canadian territory. Consequently, the question arises whether Rupert's Land, as transferred to Canada in 1870, then included Hudson Bay and Hudson Strait as parts thereof.

The only official description of Rupert's Land, so far as can be discovered, that has ever been given, was that made by the Governor of the Hudson's Bay Company in 1857, when the chief point in issue was not what areas were under the jurisdiction of the Company but whether the Company had made adequate attempts to develop the areas under its jurisdiction. The 1857 description, made by the Governor, was in fact made by the way; what was included in Rupert's Land can only be discovered from the charter of 1670 and the intent and activities of the Hudson's Bay Company.

By the charter of 1670 the Hudson's Bay Company was granted the sole trade and commerce of all seas, bays, sounds, &c., lying within the entrance of Hudson Strait, together with all the lands and territories upon the coasts and confines of the seas, bays, sounds, &c., aforesaid. This grant was made in the seventeenth century when claims to exclusive possession of vast bays and seas were recognized and admitted.[1] As late as 1809 Turkey, whose territory embraced the Black Sea, was admitted to have exclusive possession of and jurisdiction in the Black Sea.[2] In 1713 the Hudson's Bay Company's title under its charter was validated in international law by the Treaty of Utrecht.[3] Then, after 1713 for well over a century, the Hudson's Bay Company jealously maintained its exclusive possession of and title to Hudson Bay and Hudson Strait. If Turkey in 1809 included the Black Sea, it would seem that, by analogy, as well as by practice, by grant, and by the rules of international law of the period, Rupert's Land at that time included Hudson Bay and Hudson Strait.

By the beginning of the nineteenth century the old rule of international law, by which title to vast bays and seas might be claimed and admitted, had been and was gradually being narrowed to the modern ten-mile rule.[4] Yet late in the nineteenth century,

[1] See Hall's *International Law*, 8th ed., secs. 40 and 41, pp. 178–97, at pp. 182–3.

[2] Hertslet's *Treaties and Conventions between Great Britain and Foreign Powers* (1827), Vol. II, p. 371, at p. 375, Article XI. Also see Hershey, *Essentials of International Public Law and Organization*, revised ed., p. 304, note 19. See Balch, *l.c.*, at p. 419, as to the Black Sea. It is to be noted that prior to 1809, when entirely surrounded by Turkish territory, the Black Sea was a closed sea.

[3] France, the only other claimant, and so representing the Powers, then relinquished her claim to the area to Great Britain.

[4] See Hall, 8th ed., pp. 189–90. Also see Balch, *l.c.*, for history of development of this general rule.

in the year 1870, the Hudson's Bay Company surrendered, and the Crown transferred to Canada, Rupert's Land, as granted in 1670. The original grant would seem to have included in Rupert's Land both Hudson Bay and Hudson Strait. After 1870 Canada included Rupert's Land. If, in 1670, Rupert's Land included Hudson Bay and Hudson Strait, it would seem that, notwithstanding the narrower rule of international law in 1870, Canada, in taking national title to Rupert's Land, also took if not indisputable national title then the title of the Hudson's Bay Company to Hudson Bay and Hudson Strait.

The boundaries of Rupert's Land, not having been precisely defined in the Order in Council of 1870, a subsequent question arose as to where the northern boundary of Canada was located. In 1880 that question was answered by an Imperial Order in Council, which admitted to Canada and made part of the Dominion all British Territories in North America adjacent to Canada, except Newfoundland and Labrador.[1] So far as Hudson Bay, Hudson Strait, and Rupert's Land were affected by this Order in Council, it merely confirmed the Order in Council of 1870. In 1895 an Imperial statute[2] confirmed the provisions of the Order in Council of 1880. The title of Canada to Rupert's Land (whatever Rupert's Land may have included, whether Hudson Bay and Strait, or not) as acquired in 1870, became incontestable under the Imperial Order in Council of 1880 and the Imperial statute of 1895.

Although Canada acquired title to Rupert's Land in 1870, it was not until 1895 that the region was divided into administrative districts. In 1876, by statute, the district of Keewatin had been established in that part of Rupert's Land lying immediately west of Hudson Bay, with its eastern boundary running along the west coast of the Bay[3] but it was not until two years after the Order in Council of 1880 that any question arose as to administration and government in Rupert's Land, renamed the North-West Territories. In that year, 1882, the Canadian Privy Council decided that it was unnecessary to take any steps

"with a view of legislating for the good government of the country until some influx of population or other circumstances shall occur to make such provision more imperative than it would at present seem to be."[4]

[1] *Supra*, p. 10, n. 2.

[2] *Supra*, p. 10, n. 3.

[3] 39 Victoria, cap. 21 (Canada), 1876.

[4] Cited by Holmdene, Arctic Islands Sovereignty, Manuscript Room. Public Archives, Ottawa.

Until 1895 no further official action with reference to the North-West Territories was taken by the Canadian Government.

In 1895, by Canadian Order in Council,[1] the northern parts of the North-West Territories were divided into four districts, of which Ungava, Keewatin, and Franklin touched Hudson Bay and Hudson Strait. The district of Ungava on the north and west was bounded by Hudson Strait and Hudson Bay, islands within three miles of the coast being included as part of Ungava, islands beyond being administered by the Dominion Government. The district of Franklin on the south was bounded by a line beginning at Cape Best at the Atlantic entrance to Hudson Strait, thence running westerly through Hudson Strait and the channels immediately north of the continent. It was proposed that the statute of 1876 with reference to the district of Keewatin be amended by running the eastern boundary line to follow the sinuosities of the coast of Hudson Bay.

The Canadian Order in Council of 1895 was occasioned by a parliamentary debate in 1894 on the question of British sovereignty in and over Hudson Bay. In the course of that debate the Prime Minister stated:

> "Some steps have been taken through the agency of the Department of Marine and Fisheries to publish notice that the laws of Canada apply in these waters; . . . these notices have been to a great extent formal. Nevertheless, so far as the records of my department show, there has been no inaction in that connection that would in the slightest degree prejudice the rights of Canada over this region."[2]

Some questions having arisen as to whether all the Arctic Islands had been included in the four districts established by the Order in Council of 1895, that Order in Council was, in 1897, cancelled and the whole of the North-West Territories divided into nine districts,[3] the boundaries of the four northern districts, Ungava, Mackenzie, Yukon, and Franklin, being changed so as to include all the islands north of and adjacent to the continent. By the Order in Council of 1897 the district of Keewatin was bounded on the east by a line running north from the Quebec boundary on James Bay, through the middle of James Bay and Hudson Bay to the middle of the channels, separating Mansfield, Nottingham, and Mill Islands on the west from Coats and Bell Islands on the east, thence through the middle of those channels to Fox Channel,

[1] *Statutes of Canada, 1896*, p. xlix.

[2] *Debates, House of Commons, Canada, 1894*, Vol. II, pp. 3275–8.

[3] *Statutes of Canada, 1898*, p. xxxvi. For boundaries see *Canada Gazette*, May 14, 1898, Vol. XXXI, No. 46, pp. 2613–14.

&c. The district of Ungava was bounded on the north by a line running through the middle of Hudson Strait, on the west by the district of Keewatin, &c. The district of Franklin was bounded by a line enclosing all islands not included in other districts.

The Order in Council of 1897 thus included half of Hudson Bay in the district of Keewatin and half in the district of Ungava; it also included half of Hudson Strait in the district of Ungava and half in the district of Franklin. The Canadian Order in Council of 1897 therefore included Hudson Bay and Hudson Strait as part of Canada.

The Order in Council of 1897 was followed, in 1906, by a statute,[1] passed by the Canadian Parliament, imposing an annual licence fee for the privilege of whaling in Hudson Bay. Section 9, sub-section 12 of the statute in part declared:

"and inasmuch as Hudson's Bay is wholly territorial water of Canada, the requirements of this section as to licensing and as to the fee payable therefor, shall apply to every vessel or boat engaged in the whale fishery, &c."[2]

In 1906 the Canadian Government in a public statute thus declared that the waters of Hudson Bay were territorial[3] waters of Canada. The statute was not disallowed by the Crown and is included in the latest, the 1927, revision of the statutes of Canada.[4] Hudson Bay has, therefore, been claimed by Canada as territorial, that is, national, waters since 1906.

At or about the beginning of the twentieth century, the Canadian Government publicly declared, by Orders in Council, and by statutes, that Hudson Bay was part of the national waters of Canada. In addition to making laws and administrative regulations applicable to Hudson Bay, the Canadian Government actively proceeded to enforce those laws and regulations in Hudson Bay.

Prior to 1900 the Canadian Government had dispatched four

[1] *R.S.C. 1906*, cap. 45, sec. 9 (12).

[2] *Ibid.*, sec. 9, sub-sec. 12: "Notwithstanding anything in this section, the license fee payable for any vessel or boat engaged in the whale industry or hunting whales within the waters of Hudson Bay or the territorial waters of Canada north of the fifty-fifth parallel of north latitude, if not so engaged or hunting in connection with a factory established in Canada, shall be fifty dollars for each year; and, inasmuch as Hudson Bay is wholly territorial water of Canada, the requirements of this section as to licensing and as to the fee payable therefor, shall apply to every vessel or boat engaged in the whale fishery or hunting whales in any part of the waters of Hudson Bay, whether such vessel or boat belongs to Canada or is registered and outfitted in or commences her voyage from any other British country or from any foreign country."

[3] The word "territorial" evidently means "national", for territorial waters are those waters which extend a marine league to seawards from low-water mark. See *postea*, excerpt from article by Sir Cecil Hurst, p. 32.

[4] *R.S.C. 1927*, cap. 73, sec. 9 (10).

exploring expeditions to Hudson Bay and Hudson Strait. In 1884, 1885, and 1886, Commander Gordon, under orders from the Canadian Government, had explored the waters of the Bay and Strait, and particularly the harbour at the mouth of the Churchill River.[1] In his report Commander Gordon estimated that Hudson Bay and Strait were navigable by commercial vessels during four months of the year, July to October.[2] In 1897 the Canadian Government dispatched an expedition under Commander Wakeham to investigate the possibilities of extending the season of navigation, as estimated by Commander Gordon. In his report Commander Wakeham confirmed the opinion of Commander Gordon, made some twenty years previously.[3]

After 1900 the Canadian Government took active steps to have the waters of Hudson Bay and Strait patrolled by government expeditions. In 1902 an expedition was dispatched with instructions to patrol, explore, and establish the authority of the Government of Canada in the waters and islands of Hudson Bay and north thereof.[4] Further expeditions were sent north in 1904, 1906, 1908,[5] and 1910.[6] On these voyages the jurisdiction of Canada over the Arctic territories, the waters of Hudson Bay, Hudson Strait, and the Arctic Islands and channels, was established;[7]

"licenses for fishing were issued and whalers and others were informed that regulations in regard to fishing would be enforced and Canadian customs duties upon imported goods to be disposed of in trading with the natives would be collected".[8]

Few vessels and "interlopers" were met on these voyages; in one particular instance, however, a private fishing and hunting expedition from the United States was met, licence fees being demanded and paid.[9]

The expeditions dispatched to Hudson Bay, Hudson Strait and farther north between 1903 and 1910, in addition to patrolling the waters of Hudson Bay and Strait, investigated the possibility of establishing, and conclusively indicated the practicability of

[1] *Reports of Hudson's Bay Expedition, 1884, 1885, 1886 to Minister of Marine and Fisheries.*

[2] *Report of Hudson's Bay Expedition, 1886, ibid.*, pp. 90–1.

[3] *Wakeham Report*, p. 67, *supra*, p. 8, n. 2.

[4] *Report on the Dominion Government Expedition to Hudson Bay and the Arctic Islands on Board the D.G.S. Neptune, 1903–4*, by A. P. Low, Officer in Charge, at p. 3.

[5] For summary history of these voyages see *Cruise of the Arctic, 1908–9*, cap. 15, pp. 324–33.

[6] *The Arctic Expedition, Report, 1910.*

[7] *Cruise of the Arctic, 1908–9*, pp. 332–3.

[8] *Ibid.*, p. 332.

[9] *Ibid.*, p. 273.

establishing, a navigation route through Hudson Bay and Strait, from a harbour on the west coast of the Bay to the North Atlantic. At the same time Western Canada was, and had been, for years, demanding the establishment of a railway to a harbour on the Bay, and the reopening of the Hudson Bay route to Europe, which had been used by the Hudson's Bay Company continuously from about 1670 to 1870.[1] The insistent demand for the opening of the Hudson Bay route by building the necessary railway, coupled with the favourable reports of the investigating expeditions of 1884–6, 1897, 1903, 1904 finally forced the Dominion Government to implement the demands of Western Canada.[2] In 1910 work began on a railway planned to be built from La Pas in Northern Manitoba and connecting by rail with the prairies to Churchill Harbour on the west coast of Hudson Bay.[3] Until the second year of the Great War railway construction, port construction, terminals construction, were rapidly pushed forward.[4] General war effort finally compelled abandonment of construction of the railway and of port and terminal facilities.[5] Until 1926 the active development of the Hudson Bay Railway and the Hudson Bay route was stayed.[6] In that year, however, again at the insistent demand of Western Canada, railway, port, and terminals construction was resumed.[7] In 1927 expeditions were dispatched to buoy, map, and establish direction-finding stations for navigation, through Hudson Bay and Hudson Strait;[8] harbour and railway terminals have been built at Churchill, and since and including 1932, that is for the past two seasons, the Hudson Bay route has been in successful operation for purposes of commercial navigation. Thus, directly and solely as a result of the efforts of the Canadian Government, the general commercial navigation of Hudson Bay, both inwards and outwards, has been developed and its safety ensured.[9]

[1] *Canadian Annual Review, 1905*, pp. 230–4, 248, 257, 558; *1906*, pp. 150, 425, 451, 594; *1907*, pp. 149, 150; *1908*, pp. 152, 223, 225, 486.

[2] *Ibid., 1908*, pp. 152, 223.

[3] A. H. de Tremaudan, *The Hudson Bay Road*, p. 79.

[4] *Canadian Annual Review, 1912*, pp. 179, 180; *1913*, p. 229; *1915*, p. 689; *1916*, pp. 656, 794.

[5] *Ibid., 1917*, p. 786.

[6] *Ibid., 1920*, p. 388; *1921*, p. 394; *1925–6*, p. 184.

[7] *Ibid., 1924*, pp. 107–8; *1924–5*, p. 182; *Debates, House of Commons, Canada, 1925*, Vol. III, pp. 2779–2840; *1926*, Vol. I, pp. 10–11.

[8] *Report of Hudson Strait Expedition, 1927–8*, pp. 2–20, Ottawa. King's Printer, 1929.

[9] *Canadian Annual Review* for recent years. See Department of Marine, Canada, report "Navigation Conditions in Hudson Bay and Strait" for 1933 and preceding years.

Before the war the Canadian Government declared Hudson Bay and Strait part of the national waters of Canada, that is, part of Canada. At the same time the Canadian Government took active steps to, and did, exercise jurisdiction in and over the waters of Hudson Bay and the Arctic channels. In addition, the Canadian Government has developed, not only a landward means of access to Hudson Bay, but also, and more important, has developed and ensured the safety of the navigation route through the Bay and Strait. By declaration, by exercise of jurisdiction therein, and by development thereof, Canada has, without protest, treated Hudson Bay, Hudson Strait, and the Arctic channels as territorial, that is, national waters of Canada.

In 1921 a controversy arose with Denmark as to Canadian title to parts of Ellesmere Island, which lies far to the north of Hudson Bay.[1] The controversy has not ended, so far as is known, in any recognition by Denmark of Canadian title to the area in question, but beginning in 1920, and in each year thereafter, the Canadian Government has dispatched an annual expedition to patrol the northern waters, and has established police, customs, and postal stations at numerous points on the Arctic Islands.[2] By these means the title of Canada has been established to all that Arctic sector contained in the district of Franklin; that title has recently been admitted and recognized by Norway.[3] The title of Canada to the Arctic Archipelago, and, consequently, to Baffin Island and the Islands in Hudson Bay and Hudson Strait, thus rests on the basis of effective occupation, if not on general acquiescence.

Canada's title to all the territory bordering, and all the islands in, Hudson Bay and Hudson Strait is now incontestable. Canada's title to Hudson Bay and Hudson Strait that is, Canada's claim that Hudson Bay and Hudson Strait are Canadian national waters, is based, ultimately, on the grant to the Hudson's Bay Company in 1670, on the Treaty of Utrecht, 1713, on the exclusive jurisdiction of the Hudson's Bay Company in and over those waters for a century and a half, on the transfer of the territorial and

[1] See Holmdene, Arctic Islands Sovereignty, Manuscript Room, Public Archives, Ottawa, Canada.

[2] For summary of activities of Canadian Arctic Expeditions in 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, see *The North-West Territories 1930*, pp. 120–37, Dept. of the Interior, North-West Territories and Yukon Branch, King's Printer, Ottawa 1930.

[3] For report and announcement, see Ottawa daily papers, *Citizen* or *Journal*, dated November 12, 1910. See *Statutes of Canada, 1931*, Prefix, p. xxv.

jurisdictional rights of the Hudson's Bay Company to Canada in 1870, on the transfer of British territorial and jurisdictional rights in 1880, on the active exercise of jurisdiction in and over those waters since 1906, and on the public declaration of the Canadian Government in 1906 that these waters were national waters of Canada. In addition, Canada's claim may now be based on the development of the Bay and Strait for purposes of navigation. In negation of these bases supporting Canada's claim is the general rule of international law that a bay is not territorial or national unless its mouth is less than ten miles wide,[1] and also in negation, is the use of the Bay and Strait, by United States' whalers, from 1859 to about 1895.[2]

The first of these arguments in negation of the Canadian claim is subject to the exception based on occupation and acquiescence.[3] The second argument in negation has itself (it is hoped) been weakened by suggestions made in preceding parts of this article.[4]

In recent years a discussion of the question of the territoriality of bays[5] has been published by Sir Cecil Hurst[6] who concluded with the following working rule of international law:

"The rule of international law which may be deduced from the British authorities may be stated somewhat as follows:

"The belt of territorial waters is measured from a line which in general is the line of low-water mark. . . . When the line reaches a bay, it will pass across from shore to shore.

"A bay for this purpose, means a defined inlet, penetrating into the land, moderate in size, and with both shores subject to the same sovereign. An inlet, at the mouth of which one can see clearly from shore to shore may be presumed to have been appropriated as part of the national territory and will therefore constitute a bay; for working purposes, this distance may be taken as ten miles and the line will then pass from headland to headland. In the case of a larger inlet, it lies on the territorial state to establish that it has been appropriated as part of the national territory. Where this is not proved, the line from which the territorial waters are measured will not pass from headland to headland, but will cross the inlet at the spot where it first narrows to such an extent as to be obviously a bay; in practice, this may be taken as the place where it first narrows to ten miles.

"All the waters lying inwards from this base line are national waters and form part of the national territory. They stand in all respects on precisely the same footing as the national territory. Waters within the three-mile limit to seawards of this base line are territorial waters. In territorial waters foreign

[1] As in Wilson on *International Law*, 2nd ed., pp. 96–7.

[2] *Supra*, p. 8, n. 2.

[3] *Supra*, p. 4, n. 1.

[4] *Supra*, pp. 9 and 10.

[5] *British Year Book of International Law*, 1922–3, pp. 42–54.

[6] Now on the Bench of the Permanent Court of International Justice and for years legal adviser to the British Foreign Office.

states are entitled, to the extent recognized by international law, to the exercise of the right of passage. In national waters there is no such right."[1]

According to this statement, Hudson Bay is not in the ordinary course a bay, for, although it is a defined inlet, penetrating into the land, and with both shores subject to the same sovereign, it is far from being moderate in size. Since Hudson Bay is a larger inlet than is usually treated as a bay, if its waters are to be national waters, "it lies on the territorial state to establish that it (Hudson Bay) has been appropriated as part of the national territory". In 1906 Canada appropriated, and in 1934 continues to appropriate, Hudson Bay as part of the national territory of Canada. If it has been proven (the fact would seem to be apparent) that Hudson Bay has been appropriated by Canada, then the base line, which crosses the mouth of Hudson Bay, must next be located. In order, however, to locate the base line, the mouth of Hudson Bay must first be located.

The mouth of Hudson Bay may be located in two ways, one geographical and one navigational. The geographic mouth of Hudson Bay follows a line between Cape Digges and the base of the Melville Peninsula, running along the north-east shore of Southampton Island. The navigation mouth of Hudson Bay follows a line across the eastern entrance to Hudson Strait. For a number of reasons Hudson Strait might be considered the geographic mouth of Hudson Bay; first, because Baffin Island is placed like a lid, hinged on Melville Peninsula, over Hudson Bay and Hudson Strait, being in effect a part of the continental mass; secondly, because the Arctic channels are Canadian national waters, Hudson Strait cannot contain territorial waters in the sense in which "territorial waters" is used by Sir Cecil Hurst; thirdly, because the north-eastern boundary of Canada, from Cape Chidley runs north through Davis Strait, Baffin Bay, and the channels separating Greenland from the Canadian Arctic Archipelago, thus crossing the eastern entrance to Hudson Strait; fourthly, because Hudson Strait is the only navigable entrance to Hudson Bay; and fifthly, because Hudson Strait is the only developed entrance to Hudson Bay. For these and other reasons which might be adduced, Hudson Strait may logically be considered the geographic, as well as the navigable, entrance to Hudson Bay. If such is admitted, Hudson Strait is no longer a strait between two seas, but becomes a part of Hudson Bay, in fact the elongated mouth of Hudson Bay. Consequently, the eastern

[1] *Ibid.*, at p. 54.

entrance to Hudson Strait, being the mouth of Hudson Bay, the base line, described by Sir Cecil Hurst, runs from low-water mark on Cape Chidley to low-water mark on Resolution Island, off the south-east coast of Baffin Island.

The base line at the mouth of Hudson Bay being so located, all waters lying inwards from this base line, from Cape Chidley to Resolution Island, are national waters of Canada. These national waters of Canada stand in all respects on precisely the same footing as the national territory. Waters within the three-mile limit to seawards of this base line, at the eastern entrance to Hudson Strait, are territorial waters of Canada. In these territorial waters foreign states are entitled, to the extent recognized by international law, to the exercise of the right of passage. In the national waters of Canada, within the eastern entrance to Hudson Strait, including the waters of Hudson Strait and Hudson Bay, there is no such right of innocent passage.

If, on the other hand, Hudson Strait is not the elongated mouth of Hudson Bay, then, since Hudson Bay has been appropriated as part of Canada, the base line is drawn across the accepted geographic mouth of Hudson Bay, between Cape Digges and the Melville Peninsula, and the foregoing rules for determining national and territorial waters of Canada in that region, apply.

By the rule of international law, which Sir Cecil Hurst deduces from British authorities, Canada has title to Hudson Bay and Hudson Strait.

On the basis of occupation, and acquiescence by other states in that occupation, Canada also has title to Hudson Bay and Hudson Strait, notwithstanding the general six- (or ten-) mile rule of international law—for Canada has occupied and has developed the Bay and the Strait for navigational purposes as parts of the Canadian national domain; that occupation has not been disputed and therefore has been acquiesced in by other states.

It must be concluded then that Canada's title to Hudson Bay and Hudson Strait is now indisputable and that these great areas form an integral part of Canada's maritime domain on a par with Great Bear, Great Slave, and Winnipeg Lakes.

ENEMY PROPERTY AND ULTIMATE DESTINATION DURING THE ANGLO-DUTCH WARS 1664–7 AND 1672–4

By D. J. LLEWELYN DAVIES, M.A., LL.B., Lecturer in Law at the London School of Economics and Political Science.

THE wars with the Dutch during the reign of Charles the Second are of particular importance in the history of English Prize Law. Not only was the volume of Prize litigation very great, but some of the problems with which the High Court of Admiralty had to deal during that period bear a striking resemblance to those which confronted the Prize Courts during the last war, although those problems were then frequently regarded as entirely novel and unprecedented.[1]

During the whole of this period the High Court of Admiralty was presided over by Sir Leoline Jenkins,[2] and frequent tributes have been paid to his eminence as a Prize judge.

"His learned decisions," his biographer tells me, "made his name famous in most parts of Europe, and those who presided in the seats of foreign judgments in some cases applied to know how the like points had been ruled in the Admiralty here, and his sentences were often exhibited and obtained as precedents there."[3]

Reddie describes him as "one who distinguished himself by his great learning and ability as a jurist as well as a judge of the High Court of Admiralty", and who "expounded with the simplicity and clearness which often distinguishes higher talent" many of the points of maritime law.[4] A Prize judge cannot expect gratitude

[1] The period of the Anglo-Dutch Alliance 1688–97 which has been the subject of Professor G. N. Clark's very valuable study—the Dutch Alliance and the war against French Trade—is also very interesting from this standpoint. Great Britain and Holland were then acting together and the situation was, therefore, more like that which existed during the latter part of the Great War after the United States had come in on the side of the Allies. Some of the measures adopted to prevent goods going to France, such as the rationing of imports to neutral countries and William III's scheme for the pre-emption of neutral exports, bear an obvious resemblance to the methods adopted to prevent goods reaching Germany during the final years of the Great War.

[2] Jenkins was made judge-assistant to Dr. Exton in March 1665. The King had expressed his concern to Archbishop Sheldon that Exton was unable to cope with the increase of work resulting from the war, and Sheldon recommended Jenkins. Shortly afterwards on Exton's death Jenkins was appointed to succeed him as Judge of the Admiralty and he retained the appointment until he resigned office in 1685. The statement in Roscoe's *History of the Prize Court* that Exton's period of office extended till 1668 is incorrect.

[3] *The Life of Sir Leoline Jenkins* in 2 volumes by William Wynne, 1724.

[4] Reddie, *Researches in Maritime International Law* (1841), Vol. I, p. 169.

from the ambassador of a neutral state, but the Swedish Minister, although he was constantly protesting against belligerent interference with Swedish traders, in a private letter writes to Jenkins:

"Before going out of the town, I found it to be my duty to wait on your right worshipful to acknowledge with my hearty and humble thanks your justice towards the subjects of my Royal Master, not doubting of your equitable continuation in the same, for which the Swedish nation, and I in particular, shall be beholden unto you."[1]

The Prize proceedings of this earlier period have not in the past received the attention which they deserve, and this neglect must be attributed mainly to the absence before the time of Lord Stowell of adequate reports of the judgments given in Prize cases. Although it appears from a statement made by Sir Leoline Jenkins in the House of Lords that the judges of the Admiralty used to state "the arguments and reasons of law" upon which their decisions were based,[2] the Sentences as recorded are in set form and merely declare that a vessel or cargo had been lawfully condemned as belonging to the States of the United Provinces or their subjects and inhabitants.

In the absence of reported judgments it is necessary to resort to various other sources of information in order to ascertain the principles upon which Sir Leoline Jenkins's decisions proceed. Of these the most informative are the reports, which the judge of the Admiralty was called upon to furnish to the Lords Commissioners in Prize and the Privy Council, of the vessels and cargoes which had been brought in by their captors.[3] The usual course was for the Commissioners to send the ship's papers, together with the testimony of the witnesses examined at the port, to Jenkins with a request for his report thereon, so as to enable them to decide whether there were adequate grounds for her detention.[4] Sometimes the request was for a statement of the reasons why a particular vessel had been condemned, so that an answer could be made to the protest of some neutral minister. These reports are to be found copied from the originals in a bound manuscript volume among the State Papers at the Public Record Office.[5] A con-

[1] The passage is contained in a letter dated January 22, 1666, commending to Jenkins the case of *The Stockholmer* which was believed to be neutral. *H.C.A. Misc.* 409.

[2] Wynne, Vol. I, p. lxxxvi.

[3] The management of Prize affairs was entrusted to the Commissioners in Prize or the Privy Council on the outbreak of the second Dutch War, and they were given power to appoint Sub-Commissioners. P.C. 1/57. It was also ordered that all ships' papers should be scaled and sent to the Commissioners.

[4] *H.C.A. Misc.* 410 and 483.

[5] *S.P.* 9/240, described as Reports by Dr. Leoline Jenkins, 1665–6.

siderable number of them were printed by Wynne in his *Life of Sir Leoline Jenkins*, which was published in 1724, and they have been described by Wheaton as "a rich collection of precedents on the Maritime Law of Nations".

The information furnished by these reports is supplemented by that which is to be obtained from the other records of the High Court of Admiralty, and particularly from the Interrogatories. Standing Interrogatories were not as yet in use, and the witnesses were examined upon Special Interrogatories authorized in each case. These Interrogatories, together with the answers given by the witnesses, are valuable both as indicating the extent to which captors were allowed to rely on general circumstantial evidence, and as showing the attitude of the Court on the much-disputed subject of the Burden of Proof in the Prize cases. They also show that the question of Ultimate Destination was a very important factor even at this period.

In order to appreciate the nature of the problems which confronted the Court at this time it is necessary to bear in mind that there has since been a change in the relative importance of the questions of Prize law. It has been stated that among the present-day questions touching the intercourse between belligerent and neutral, the most important is that of Contraband.[1] It is true that Contraband was the subject of considerable discussion during the Anglo-Dutch Wars,[2] but by far the most important question was that of Enemy Property.

The explanation for this lies partly in the fact that a neutral ship gave no protection to enemy property, but principally in the position which the Dutch occupied at this time as the leading trading nation in Europe. Sir William Temple in his *Observations on the United Provinces*, written in 1668, declares that it was generally esteemed that the Dutch had more shipping belonging to them than all the rest of Europe together.[3] "The country", he says, "has become rich by the force of industry, by being the general magazine of Europe, and furnishing all parts with whatever the market wants and invites, and being as they are very properly called, the common carriers of the world." "They buy infinitely," he adds, "but 'tis to sell again upon the improvement of the commodity or a better market."

[1] See Moore, *International Law and Some Current Illusions*, p. 25.

[2] See Jessup and Deak, "The Early Development of the Law of Contraband of War", *Political Science Quarterly*, 1932–3.

[3] Temple, *Works* (1731), Vol. I, p. 60.

England's main object was to destroy the commerce of their enemies. "What matters this or that object?" Monk is reported to have said, "what we want is more of the trade that the Dutch now have."[1] In order to preserve their trade the Dutch merchants resorted to all manner of disguises in the hope of giving their goods the appearance of belonging to neutrals. A method usually adopted was to have their goods consigned in the name of some neutral person, who, for a commission, undertook the risk of their capture and was prepared if necessary to swear that they were upon his "own proper account" and that "no other person can, or ought to pretend to any interest in them".[2] It is in the means adopted by the Court for the purpose of discovering the real ownership of captured property that the main interest of the Prize proceedings under Sir Leoline Jenkins lies.

Proof of Enemy Property

The problem of providing some scheme whereby the true character of ships and their cargoes could be satisfactorily determined while avoiding the friction which the usual procedure in Prize cases inevitably engendered had already received considerable attention about this time. Various solutions were attempted.

Thus it was provided by Article XII of the Treaty of 1661 with Sweden that in order "to avoid suspicion and collusion" and lest the goods of enemies be disguised under the goods of friends "all vessels should be furnished with passports", and the parties agreed that upon the production of such passports there should be no further search except where there was "just and urgent cause of suspicion why their ship should be searched which shall be only deemed justifiable in that case and not otherwise".[3] This experiment, however, failed to afford to the belligerent an adequate assurance that the property was really as described in the passports. Nor did it prevent disputes as to what constituted "a just and urgent cause of suspicion". The Swedish Ambassador was continually protesting against the "great loss which Swedes have suffered by having been brought up by some of His Majesty's frigates when they have not given them enough cause of suspicion to defend it, but could evidence the integrity of their trade by passports and bills of lading that they were the subjects of the

[1] Cited in Mahan, *The Influence of Sea Power on History*, p. 107.
[2] *S.P.* 9/240. Jenkins's Report on *The Little Dorothy*.
[3] The text is given in Jenkinson's *Collection of Treaties*.

King of Sweden and their goods likewise free".[1] This was no doubt in part due to the fact that the neutral authorities did not always exercise the necessary diligence or good faith in granting their passes and certificates,[2] but perhaps even more, to the subterfuges adopted by the applicants for the purpose of obtaining them.[3]

Another scheme which was adopted, apparently with greater success, was that of having the ships and cargoes certified by the English Minister or his representative stationed at the neutral port.[4] This is another instance where the experience gained during the last war seems to have been anticipated at this period.[5]

The exercise of the right to visit and search has frequently been a cause of controversy, and in view of the fact that the practice of seizing vessels on suspicion and bringing them into port to be examined evoked the severe condemnation of some of the neutral Powers during the Great War as being a novel and unwarranted exercise of belligerent power, it is interesting to find that the same practice was resorted to at this time. By an order given by the Duke of York as Lord High Admiral pursuant to His Majesty's Instructions dated November 24, 1665, the naval commanders were directed: "In case they meet any ships of Dutch or Hamburgh built sailed by foreigners except Swedes, although pretending to belong to friends and to be bound to friendly ports, they shall be sent to the most convenient port." The reason given for this was, "the Dutch not being able to carry on their trade during the winter season having to pass by Scotland, resorting to false papers, pretending to be bound to the ports of His Majesty's

[1] *H.C.A. Misc.* 410. The Swedish Resident to the Commissioners in Prize, June 30, 1672. During the previous war he had similarly complained that Swedish ships had been detained and at last released and that "such proceedings are apprehended to be inconsistent with those privileges and the freedom of trade contained in the Treaty". Privy Council Register, August 17, 1666 (*P.C.* 2/59).

[2] Sir Leoline Jenkins complains to the Commissioners in Prize that it was not "unknown that attestations are too often passed without that due inspection and solemnity as is requisite". *S.P.* 9/240, April 29, 1666. Also in Wynne, Vol. II, p. 728.

[3] One of these methods was to make a pretended sale of the ship to a neutral for a fictitious consideration. The master would then swear that she was neutral-owned, and the Chambers of Commerce would thereupon grant the necessary passports. See the Interrogatories in the case of *The St. Anne of Hamburgh*, *H.C.A.* 4/27.

[4] Jenkins suggested to the Commissioners in Prize that the King's Proctor should prepare a form for the examination of neutral shippers, "or else that such laders as desire to benefit from attestations should satisfy His Majesty's Ministers in that town respecting their respective properties". Jenkins's Report on *The St. George of Hamburgh*, Sept. 17, 1666, *S.P.* 9/240; also in Wynne, Vol. II, p. 729. Jenkins declares that he always attaches the greatest weight to these certificates.

[5] See Pearce Higgins, "Visit, Search, and Detention", *British Year Book of International Law*, 1926, p. 43, esp. at p. 52.

allies, whereas really belonging to enemies and proceeding to enemy ports."[1]

After a vessel had been brought in, the Commissioners in Prize had to determine whether the circumstances justified them in requiring the neutral claimants to incur the expense and delay of legal trial. From the reports furnished by Sir Leoline Jenkins on that preliminary issue it is possible to ascertain the principles adopted by the Court of Admiralty on the question of proof in Prize cases.

This matter was very thoroughly considered in the case of two vessels, *The Emperor Constantine of Venice* and *The Ascension of Genoa*. Both ships were owned by neutrals and were going to the neutral port of Ostend with cargoes of rice, oil, &c., taken in at various ports between Venice and Cadiz claimed to be the property of neutrals.

The captains immediately petitioned the Commissioners in Prize for their release, and shortly afterwards the Spanish Ambassador protested against their detention, and Jenkins was requested to report on the case.[2]

He replied that he was not prepared to recommend their discharge.[3]

"For, although this be a free port," he says, "and the ship, master, and the company be free also, yet there are certain presumptions for the King that do, as I humbly conceive, subject this ship to a very severe excussion, for besides that 'tis sufficiently known upon whose account there is so much trading of late with Ostend, this master whose course of trade lay all his life with the Levant would not have come to our shores without extraordinary high freight, which Flandrians have not reason to give to him. But the Hollanders had in that they cannot safely trade (at leastwise) in their own bottoms."

He concluded, therefore, that

"upon the whole matter, it may be very reasonably presumed and suspected that the ships were not without Holland goods aboard them."

In view of this report the proceedings were allowed to take their course in the Admiralty, but the claimants "industriously declined a judicial trial, insisting only on their being free persons". They argued that as no *prima facie* case had been made out against them, they could not be called upon to give further proof that they

[1] Orders of the Duke of York Ad. 2/1725.

[2] The petitions of the two Captains were submitted to Jenkins August 21, 1665, *H.C.A. Misc.* 482. On September 4, Arlington writes that the Spanish Ambassador is pressing for the release of the vessels, and Jenkins is requested to suspend the trial pending the receipt by the Commissioners of his report. *H.C.A. Misc.* 409.

[3] *S.P.* 9/240. Jenkins to the Commissioners in Prize September 12, 1665.

were the real owners of the goods. On this question the two judges of the Admiralty, Dr. Exton and Sir Leoline Jenkins, held entirely different views, and they were therefore requested to report to the Council on "the state of the case and the whole matter as it appears to their judgments severally and distinctly".[1]

In Dr. Exton's opinion there was no legal proof against the vessels or their cargoes and he maintained that they should be discharged.[2]

"Now, these vessels," he says, "being free, trading from free port to free port, and likewise, to and for the account of free persons, by the proofs in preparatory, as either by the bills of lading or allegations appears (against which proofs nothing is either judicially alleged or proved), ought, as I humbly conceive, by the course and rules of the Admiralty Court, to be freed and released."

Sir Leoline Jenkins, on the other hand, stood by the view he had previously expressed in his report to the Commissioners in Prize. His suspicion, he states, relates to some of the lading and is grounded partly upon the ship's papers and partly upon the company in which the ships were taken "not to mention Ostend which was the port pretended for discharge". The fact that the masters of the vessels did not "speak out", and that "a judicial scrutiny had been very industriously declined" by the claimants, although "if their property had been clear they might have made a satisfactory proof of it" in less than half the time they had taken to protest, added to his suspicion.

The concluding passage contains a full and clear statement of Jenkins's view of the attitude which the Court should adopt in condemnation proceedings.

"Yet I must confess", he states, "that all this I have offered is no more than a matter of presumption against the ships. There are no proofs in the case. But I humbly crave leave to observe unto Your Majesty two things which I conceive to be undeniable. The one in point of law, that where proofs are difficult, such presumptions as are just and weighty shall so affect the party presumed against as to be reputed proofs against him until he do take them off and evidence the contrary by legal and concluding proofs. The other in point of fact, that where colouring is, 'tis impossible there should be anything but presumptions on Your Majesty's behalf, for as it is certain that the Dutch do still carry on a main trade under these disguises, so it is not to be expected that they shall lay their courses with such colour that they shall at first view betray their designs."

These reports after they had been read at the Council were referred to the Commissioners for Appeals "to take the same into

[1] Orders in Council, October 6 and 20, 1665, *H.C.A. Misc.* 409.

[2] Sir Leoline Jenkins's report was printed in Wynne, Vol. II, p. 700. Dr. Exton's does not appear to have been published. Both are among the Orders in Council in *H.C.A. Misc.* 483.

their consideration, and upon a further examination and disquisition of the business (in order where unto they are to call the judges of the High Court of Admiralty, and such other of the civilians as they shall think fit, to attend them), and report their opinion upon the whole matter unto His Majesty in Council".[1] Unfortunately the search for any record of the conclusions of the Commissioners has been unsuccessful, but the subsequent history of the vessels and their cargoes shows that Sir Leoline Jenkins's attitude must have prevailed. The two vessels were released in December 1665 upon security being given, but *The Emperor Constantine*, at any rate, was not ordered to be restored and her bail discharged until March 1667. Claims in respect of the goods were allowed from time to time, but presumably, only after the various claimants had satisfied the Court of their property in them by "legal and concluding proofs".[2]

It is quite clear from this and other cases that the rule that a ship's papers must be considered conclusive as to her innocence or the innocence of her lading was not accepted at this period. Indeed, in one of his reports to the Prize Commissioners Sir Leoline declared: "My Lords, I heed not any ship's papers."[3]

Nor was the principle that a ship must be condemned out of her own mouth followed, for as his reports on *The Emperor Constantine* and *The Ascension* show, Sir Leoline Jenkins's attitude was, that where the surrounding circumstances raised a reasonable suspicion of enemy interest in a vessel or her goods, the burden was on the neutral claimant to rebut such inference by "legal and concluding proofs" of his property.

That captors were allowed to make use of any information which suggested a probability that the goods were really enemy property is proved by the nature of the Interrogatories which they were permitted to administer. Minute particulars were required concerning the claimant's trade before the war, for these would help to show whether he was genuinely trading on his own account

[1] P.C. Register, November 2, 1665. *P.C.* 2/58.

[2] See *Kalendar of Ships and Goods Released 1664–1667* (*P.R.O. Ref. Index* 9027). That the case was subjected to "a severe excussion" is also shown by the petition of Edmund Arnold, Examiner and Translator to the Admiralty Court, which includes a sum of £2 (one of the heaviest items in his account) for "sorting, abstracting, and examining the papers" of *The Emperor Constantine* and *The Ascension*: *H.C.A. Misc.* 409.

[3] Jenkins to the Commissioners in Prize, June 14, 1665. "The French", he says, "do take it much amiss that I do require further proofs than the ship's papers (for, My Lords, I heed not any ship's papers) since the voyage is from one French port to another."

or was merely colouring enemy goods. Thus, for example, in the case of *The Swedish Lyon* it is asked whether the witness

"doth not believe the said Samual Blake doth trade for Dutchmen and doth sometimes lend his name to set off their goods if they be seized. What Dutchmen doth he correspond with as he hath heard and believed?"[1]

It is quite clear from his reports that Sir Leoline Jenkins attached considerable importance to matters of this kind. Thus in the case of *The Saint Jacob of Hamburgh* he informs the Prize Commissioners that part of the cargo was consigned to one Daniel Oyers and that

"he is certainly one that colours Dutch goods and often lends a specious, equivocating, attestation to his friends, though not so, luckily, that we have not now and again, condemned very considerable parcels of his factorage and consignation."[2]

In the same report there follows a statement which seems to suggest that even the "Black List" was not a new invention of the Great War. "Besides him," Jenkins continues, "there is one John Temming and this Wrede's father upon a private list which I have from Sir William Swan of such Hamburghers as do business for Hollanders or are in partnership with them."

Ultimate Destination

A matter to which the greatest importance was attached by Sir Leoline Jenkins was the ultimate destination of the vessel or the goods. In order the better to avoid suspicion the Dutch not merely got some neutral person to lend them his name, but they also had the goods consigned to a neutral port. When a ship was seized her papers would show that she was sailing from one neutral port to another with a cargo which had been shipped by a neutral shipper for a neutral consignee. Such a cargo would appear to be innocent enough of any enemy interest. But if it could be shown that its ultimate destination was not the neutral port, but that it was to be sent on from there to Holland, this would immediately raise a suspicion that the real owner was probably a Dutchman.

The ship's papers would, as a rule, give no suggestion of any such further destination, for that would have been carefully concealed. The captors would therefore interrogate the witnesses to discover whether they had any knowledge of some such design on the part of the shippers. Thus in the case of certain vessels which

[1] *H.C.A. Interrogatories*, 1664–7; *H.C.A. Misc.* 4/27.
[2] Jenkins to the Commissioners in Prize, April 26, 1667, *S.P.* 9/240.

were captured on their way to Hamburgh during the war of 1672–4, the witnesses were asked

"whether not someone other than the person to whom the goods were consigned assumed the risk of the goods until they arrived in Hamburgh, and after their arrival there were not the same, or some of them to have been carried to some parts in Holland . . . or some place adjacent in the dominions of some other prince or state to be from thence conveyed thither."[1]

And again during the previous war in the case of *The St. Mary of Emden* each witness is to be asked

"whether notwithstanding the said wines were (as it is pretended) consigned to be delivered at Emden, yet in truth he does not know or believe in his conscience that the said wines are to be discharged out of the said ship at Emden and then sent into some part of Holland . . . and whether he does not verily believe that the port of Emden is only named to give less cause for suspicion of the said wines."[2]

As a rule, the answers given to this kind of interrogatory do not appear to have been very helpful, for the witnesses usually swore that even if there was any such design on the part of the laders, they were entirely unaware of it. Thus, where the master was asked "if these said goods were not to be sent from Ostend, where wools are not usually brought, to Holland and Zealand where the said trade is used, he says that the merchants have not told him anything". The ship's carpenter similarly testified that "he knoweth nothing of any other design nor whether the goods were to be transported from Ostend to Holland or Zealand, nor what the merchant intended nor for whose account they were laden".[3]

In view of the difficulty of obtaining direct testimony, the captors found it necessary to rely on more circumstantial evidence to raise a presumption of ultimate enemy destination. One of the things which would help to discover the real facts would be the nature of the trade, if any, carried on by the neutral claimants before the war. Thus in the case of *The St. Mary Magdalene*, every witness was asked:

"how long has the said Francis Knyffe used to trade in Malleya wines and raisins. . . . Let the witness be asked and declare the reason, in his judgment why so many and frequent consignments of wines, almonds and raisins, and other goods, have been made unto the said Knyffe in Flanders, more than formerly has been done."[4]

[1] *H.C.A. Interrogatories*, 1671–2; *H.C.A.* 4/28.

[2] *H.C.A. Interrogatories*, 1664–7; *H.C.A.* 4/27.

[3] *H.C.A. Examinations*, 75.

[4] *H.C.A. Interrogatories*, 1664–7; *H.C.A.* 4/27. The judgment of the Privy Council in *The Consul Corfitzon*, [1917] *A.C.* 550, illustrates the remarkable similarity of the attitude taken on the same question during the Great War. "It appears to their Lord-

But perhaps the most interesting feature of the Prize proceedings of the period is the reliance placed by the captors on the extraordinary increase in the trade to various neighbouring neutral countries which had taken place since the outbreak of the war. The following interrogatories show the manner in which they were able to resort to "statistical inferences" to create the presumption of enemy destination and character.

In *The Mary Magdalene*, the witnesses are examined

"whether since the last vintage more wines, both Spanish and French, have not been consigned and brought to Ostend than were in five vintages before, or in what time as the witness doth know."

Then follows the general question,

"whether by reason of what he hath made answer unto the present interrogatories, or for some other cause or reason, he doth not believe that a great part of the wines and raisins and other goods consigned unto Ostend, Bruges, and Dunkirk, are the proper goods and merchandize of the subjects of the said States of the United Provinces, and the persons to whom they are consigned in Flanders do observe their orders and directions in disposing of them."

One of the clearest cases on this point is *The St. Martin* which was captured on her way to Ostend with a cargo of Spanish wool from Bilbao.[1] The following questions were put on behalf of the captors to show that the cargo was probably going ultimately to Holland.[1]

"Whether some port in Zealand doth not lie near unto the harbour of Ostend . . . and whether a ship in her course being come near Ostend may not in a short time . . . and without danger, sail secure into some port of Holland or Zealand without any danger of capture.

"Whether the great trade of Segnovia wools from Bilbao is not carried on by the Dutch, and whether in times of peace . . . the Dutch do not carry away from Bilbao all their wools directly into Holland and land not in Ostend. And whether, on the contrary, in time of war, the Dutch do not usually consign their wools unto Ostend and sometimes discharge the same there for prevention of capture by the English.

"How many ships' ladings of Segnovia wools hath he known brought unto Ostend before the war, and whether where one bag of wool hath been brought in times of peace between England and Holland from Bilbao to Ostend, an hundred hath been brought from thence to the ports and places of the States of the United Provinces and there discharged."

In order to rebut the inferences which were likely to be drawn from the answers to the foregoing interrogatories, the neutral

ships to be beyond question that inferences on this question might properly be drawn from the course and nature of the appellant's business in goods of a similar nature both before and after the outbreak of the present war and in particular from the volume of his trade with Germany before and since the war." *Per* Lord Parker at p. 554.

[1] *Interrogatories*, 1664–7; *H.C.A.* 4/27.

claimant was allowed to question the witnesses with a view to showing that the importation of such commodities to Flanders was capable of an innocent explanation. They were therefore examined to show that they were aware that for several years Spanish wools had been imported at Ostend and other places in Flanders, and that they could actually name some of the vessels which had brought such cargoes there. In conclusion, every witness is asked "whether he does not know that Spanish wool is a commodity used in Flanders for manufacture".[1]

The view which Sir Leoline Jenkins took as to the weight to be given to this kind of circumstantial evidence was fully set forth in the case of *The Emperor Constantine* and *The Ascension*. Where, from the usual course of the claimant's trade, or from the sudden increase in the imports of a particular commodity to a neutral port, it was reasonable to infer that the goods were on their way to Holland upon the account of enemy subjects, he was not prepared to direct their discharge until the neutral claimant had established "by legal and concluding proofs" that they were "upon his own proper account".

"And as on the one side", he says, "'tis a high disservice to your Majesty that such negotiants as are free and innocent should be worried with groundless and vexatious delays, so on the other hand, it seems most just and suitable . . . that those who pass . . . towards a port so justly suspected as Ostend is, should give a satisfactory account (which they who are in bona fide are seldom unprovided to give), that they do not carry on the trade of those who are in hostility against Your Majesty."[2]

In order to overcome the suspicion of enemy character the claimant had to show how he had paid for the goods which he claimed to be upon his own proper risk and account. Thus in *The St. Anthony of Padua* the goods were discharged because the claimants had given "an account of the effects in their hands which enabled the lading to be made".[3] But in *The St. Jacob of Hamburgh* he was not prepared to order their release since the neutral had failed to show that he had any visible effects at the place where he claimed to have bought them.[4]

As was also the case during the Great War, the neutral was

[1] It appears that the Crown was prepared to meet this explanation, for the witness is also to be asked, whether assuming that such goods are used in Flanders for manufacturing purposes, "are they not brought into Flanders from some part of the . . . States of the United Provinces and bought of their subjects".

[2] *H.C.A. Misc.* 483; Wynne, Vol. II, p. 700.

[3] Jenkins to Commissioners in Prize, June 12, 1667, *S.P.* 9/240.

[4] Jenkins to the Commissioners in Prize, April 26, 1667, *S.P.* 9/240.

expected to produce his books "mercantably kept".[1] Evidence was frequently given that these books had been inspected and that it was apparent from them that the goods in question were "upon and for his own account and risk".[2]

Sir Leoline Jenkins's experience was that neutrals whose claims were genuine raised no objection to furnishing the necessary information. Speaking of the Ostenders, he tells the Commissioners in Prize that when their claims are made in good faith they are always ready to send over extracts out of their books.[3] And again in the case of *The Golden Serpent of Hamburgh* he declared that "such proofs are made without difficulty where the merchants claiming are in bona fide".[4]

Conclusions

This examination of the records of the High Court of Admiralty shows that the principle of looking beyond the immediate destination of a cargo was well established in Prize proceedings at the end of the seventeenth century. The object with which it was then applied was to overcome the attempt to disguise as neutral property, goods which in fact were going to the enemy, and probably upon their account. The theory that Continuous Voyage made its first appearance in Prize law in connexion with the Rule of 1756 must therefore be reconsidered in the light of the information obtained from these earlier proceedings. Thus the case of *The Jesus*[5] in 1756 which has been described as "the earliest case of the application of the Doctrine of Continuous Voyage which has yet been found",[6] does not appear to be in any way different from the decisions of Sir Leoline Jenkins. In that case the vessel was sailing from Corunna with a cargo of French colonial produce to San Sebastian, but it was testified by the master and some of the

[1] For the practice during the last war see *The Consul Corfitzon*, [1917] A.C. 550.

[2] The following is an example from the Examinations "when did the consignee have first notice of the lading and what dates do the letters bear, and whether such letters were entered in her books or in the registry of letters written by her, and whether any was sent to her and whether it was entered in her books, and whether the witness hath lately viewed and inspected the entry of such ladings or invoices". *H.C.A. Examination*, 75 (1664–6).

[3] Report on *The Pearl of Ostend*, June 11, 1666, *S.P.* 9/240.

[4] Report on *The Golden Serpent of Hamburgh*, June 26, 1675, *S.P.* 9/240; Wynne, Vol. II, p. 753. Similarly in his report to the King on *The Emperor Constantine* and *The Ascension* Jenkins stated that "they who are in bona fide are seldom unprovided to give . . . a satisfactory account", of their property.

[5] Burrell, 165.

[6] *Mootham*, "The Doctrine of Continuous Voyage", *British Year Book of International Law*, 1927, pp. 62, 66.

crew that the voyage "was to have ended in France and that he believed the lading to belong to French subjects". The Lords Commissioners directed the claimant "to make further proof that the ship and cargo were Spanish property and that the ship when taken was bound from Corunna to San Sebastian and to no other port within two months".

At first sight it would appear that this was an application of the Doctrine of Continuous Voyage to the Rule of 1756, but it is submitted that this is not the correct interpretation of the decision. The assurance as to the ultimate destination of the vessel which the claimant was required to give before his claim was allowed was required merely for the purpose of rebutting the inference of enemy property. Sir Leoline Jenkins had frequently demanded the same undertaking.[1] Similarly in the cases of *The Juan Baptista*[2] and *The Maria Teresa*[3] which have also been considered in this connexion, the question of the ultimate destination of the vessels and their goods was introduced merely because of its relevance in determining whether they were neutral or enemy owned.[4]

These cases, therefore, do not appear to involve any extension of the use of the principle of Ultimate Destination, nor do they throw any light on the question of when it came to constitute a rule of substantive Prize law, and not merely presumptive evidence of enemy character.

Further researches may result in the discovery of earlier decisions on the subject, but at present it would appear that *The Polly*, decided by Sir William Scott in 1800, must have been one of the first cases where the question whether a cargo which was proved to be neutral-owned was nevertheless liable to confiscation under the Doctrine of Continuous Voyage was definitely raised.[5] The captors in that case contended that since it appeared that the cargo had been brought from Havana to America and from there

[1] In the case of *The St. Valerie*, 1665, *S.P.* 9/240, he recommended that the vessel be released "on bail not to discharge at any other port than Dunkirk and thereof to retain a certificate comprehending in it the oath of the consignatorics and their factors that what they do in receiving the said lading is not by order from or colour under any subject of the States".

[2] (1757) Burrell, 164.

[3] (1759) Burrell, 204.

[4] That this was how the question was considered is shown by the decision of the Commissioners of Appeal which reversed the decision of the *H.C.A.* and allowed the claim, "the weight of the evidence being that the said cargo belonged to the subjects of the States General".

[5] 2 C. Rob. 361. This case and the other decisions of Lord Stowell on the Doctrine of Continuous Voyage have been fully considered by Mr. Mootham in the article already mentioned.

sent on to Spain, "from which a suspicion must necessarily arise of Spanish interest", the claimant should be put to further proof. So far the case proceeded along the same lines as the decisions of Sir Leoline Jenkins, and when Sir William Scott asked "is it contended that an American might not purchase articles of this nature and import them, bona fide to America on his own account and afterwards export them?" it was answered, "no, that was not contended, but that the truth and reality of the importation for his own account was the point in question; that all the circumstances in the case pointed to a near connexion with Spanish interests".

The Court, however, was satisfied that the cargo was the property of the neutral claimant, but the captors argued "that if it was even neutral property, a question of law would arise, whether such a trade was not to be considered as a direct trade between the colony of the enemy and the mother country".

It was not necessary to decide the question here since Sir William Scott was satisfied that there had been a genuine importation into the United States. He therefore contented himself with merely stating the issue which had been raised; "whether this is not such a trade as will fall under the principle that has been applied to the interposition of neutrals in the colonial trade of the enemy, on which it is said, that if an American is not allowed to carry on his trade directly, neither can he be allowed to do it circuitously".

THE ENGLISH DOCTRINE OF THE RENVOI AND THE SOVIET LAW OF SUCCESSION

By S. DOBRIN, of the English and the Russian Bar

In this article I intend to consider how the English doctrine of the renvoi works when applied to the Soviet law of inheritance. It is submitted that the interest of the inquiry is not limited to the cases when an English court may have to deal with assets of persons who died domiciled in the U.S.S.R. Tested by the Soviet law the English doctrine of the renvoi discloses its peculiarities with such a completeness as can hardly be elicited by any other test.

It is settled law that succession to movables is governed in an English court by the law of the deceased's domicil at the time of his death. It is apparently also settled that the law of the domicil means in this connexion the whole law of the domicil, including its rules of private international law, and not only its internal or municipal law. But how does the question which the English court thus addresses to the court of the domicil actually run? Is it: what would the court of the domicil decide, taking into account all the circumstances of the case and in particular the fact that the assets are situate in England? Or is it: what would the court of the domicil decide if the assets were situate within its own jurisdiction?

It had been held in *Collier* v. *Rivaz*, a case regarding the English assets of an Englishman who died domiciled in Belgium, that an English court must deal with the English movable assets as if it were sitting in the country of the deceased's domicil "under the particular circumstances of the case" (2 Curt., at p. 859). However, in *In re Ross*, [1930] 1 Ch. 377–406, a case of an Englishwoman who died domiciled in Italy, Luxmoore J., after having stated his opinion that an English court must deal with the English assets of a person who died domiciled abroad just as the court of the domicil would deal with them, continued (at p. 390): "In other words, the English court will endeavour to ascertain what the Italian courts would in fact decide with regard to that part of Janet Anne Ross's movable property as might come under the actual control of the Italian courts." Dicey, *Conflict of Laws*, 5th ed., p. 872, considers the hypothetical case of a dispute over the English assets of D. who died domiciled in Italy. "If D. leaves

movable property in Italy there is obviously no difficulty in ascertaining on what principle Italian courts in fact deal with such property. But even if D. left no property there it can hardly be impossible to ascertain how the Italian courts would have dealt with property that he might have left in Italy." What is the real significance of these references to the property which the deceased actually left or might have left in the country of his domicil? Are they merely figures of speech or illustrations which might seem to their authors useful and also harmless enough in their contexts even if not quite strictly correct and adequate in all possible cases? Or are they expressions of a well-thought-out legal principle of universal application in all cases? Prima facie, nothing depended on the situation of the assets either in *In re Ross* or in Dicey's hypothetical case. Both *In re Ross* and Dicey's case deal with the assets of persons who died domiciled in Italy. It has been proved by experts in *In re Ross* that from the point of view of Italian law succession to movables is governed by the national law of the deceased and does not depend on the situation of the property. An Italian court would therefore give the same decision regarding the movables of Ann Ross or of the hypothetical D., whether those movables were situate in England or in Italy. Prima facie, it is not easy to see why Luxmoore J. and Dicey so pressed the point that the answer sought by them from the Italian court was with regard to movables situate in Italy. But it is evident that they did press it. On the other hand, the situation of the property may become of decisive importance in cases where the deceased was domiciled in the U.S.S.R.

There can be little doubt that Soviet law of succession is purely territorial in the sense that it claims to govern every case of succession to assets situate within the U.S.S.R., and disclaims any authority over devolution of assets abroad, irrespective of the domicil or the nationality of the deceased. Numerous exceptions to the principle of territoriality in favour of the principle of nationality are established by treaties and other, less formal, arrangements between the U.S.S.R. and various foreign countries, but they are all exceptions only, and do not whittle away the rule, which must be applied whenever an exception cannot be proved or justified by any such treaty or arrangement.

The first half of the rule, namely, that Soviet law claims to govern every case of succession to assets situate within the U.S.S.R., can be illustrated by the following circular of the Commissariat of Justice of February 26, 1931, No. 19, published in the

official organ of that Commissariat, *Soviet Justice*, Nos. 7–8 for 1931:

"Concerning inheritances accrued on the death of Turkish citizens.

"In 1927 an exchange of notes took place between the U.S.S.R. and Turkey on the question of the rules of succession applicable to their respective citizens.

"By virtue of that exchange of notes movable assets of citizens of one party who died within the territories of the other party, were handed over without any formalities to the consular authorities of the country of which the deceased was a citizen.

"Turkey has now renounced the further application of that agreement and in this the Soviet party has acquiesced.

"In future, therefore, inheritances accruing within the territories of the R.S.F.S.R. on the death of Turkish citizens must follow the laws of succession of the R.S.F.S.R. as well as all the rules established for inheritances accrued on the death of Soviet citizens."

The circular of the Commissariat of Justice is not only formally authoritative but is sound in its substance, being based on one of the few principles of Soviet private international law which are reasonably certain. The Soviet State began its existence as an outcast amongst nations, and for years had to fight for its recognition. In addition, it never was very much interested in the treatment which foreign governments might mete out to Soviet citizens within their own territories. The number of Soviet citizens residing abroad is very small even now, it was still smaller during the first years of the Soviet régime (the so-called Russian refugees are not Soviet citizens from the point of view of the Soviet Government), and in their vast majority those Soviet citizens residing abroad are foreign to the Soviet Government by their class origin and their social and political sympathies. On the other hand, foreign governments were not indifferent to the law, including the law of succession, under which their citizens, however few in number, had to live in Soviet Russia. In those circumstances it was only natural that the Soviet Government should begin by the refusal to apply to foreigners within its own territories any law other than the Soviet law. Every government which wished an exception for its citizens, be it only in matters of succession, had to apply for it, i.e. in the first instance, to bow to the fact that there was such a thing as the Soviet Government. In that political game it was essential for the Soviet Government to insist as firmly as possible on the starting-point, namely, that no exceptions from the Soviet law could be allowed to foreigners within the U.S.S.R. otherwise than under agreements with their governments. Mere actual reciprocity practised by the courts would not do; it was

essential that the fact of reciprocity should be at least confirmed by an exchange of declarations between the governments, which exchange would already imply some measure of recognition. The fight of the Soviet Government for recognition is already a matter of the past, but meanwhile the rule that the succession to properties situate within the U.S.S.R. is governed by the Soviet municipal law, irrespective of the nationality or the domicil of the deceased, unless the contrary results from some international agreement to which the U.S.S.R. is a party, hardened into one of the most reliable principles of Soviet private international law. So long as there was in operation a diplomatic arrangement between Turkey and the U.S.S.R. the Soviet courts were bound by that arrangement. With the termination of the arrangement the courts must deal with assets of Turkish nationals situate in the U.S.S.R. in the same manner as they deal with assets of Soviet nationals. What is true in respect of succession to the assets of citizens of Turkey is equally true in respect of succession to the assets of citizens of any other country which has no special treaty or other arrangement with the U.S.S.R. on that matter.

As to the second half of the rule, that, as indicated above, is purely negative and consists of a disclaimer by Soviet law of any authority over the devolution of properties situate outside the U.S.S.R. irrespective of the domicil or the nationality of their late owner. It is very risky to speculate as to anything in Soviet law, but as matters now stand the following propositions may be accepted with reasonable confidence:

1. Faithful to its own principles, Soviet law fully admits the right of every country to govern by its municipal rules the succession to assets situate within its territories even if the *de cujus* was and all the beneficiaries are Soviet citizens domiciled in the U.S.S.R. There is no objection in Soviet law against a foreign court applying Soviet law on its own initiative to any case, but that is clearly something quite different from the claim that Soviet law should be applied. There would arise no conflict between Soviet and English law if an English court chose to apply English municipal law to the assets in England even of a Soviet citizen who died domiciled in the U.S.S.R.

2. This disclaimer by Soviet law of any application to assets situate outside the U.S.S.R. very often, if not always, coincides with, and finds its expression in, the disclaimer by the Soviet courts of any jurisdiction over such assets. If the assets are situate within the U.S.S.R., then not only does Soviet law claim to govern

their devolution, but all kinds of disputes as to their administration or distribution are cognizable by the Soviet courts. If, on the other hand, the assets are situate abroad, special circumstances are required to make any such dispute cognizable by a Soviet court. In any case, the domicil of the *de cujus* in the U.S.S.R. in the English sense is of itself not sufficient to make a dispute as to his non-Soviet assets cognizable by a Soviet court.

No doubt the question as to the law governing the devolution of assets situate outside the U.S.S.R. may arise in a Soviet court in an indirect way. Assets which were situate outside the U.S.S.R. at the time of the death of the *de cujus* may be brought somehow by some one into the U.S.S.R., and a dispute between two or more parties as to some right in them may arise in a Soviet court—a dispute which it would be impossible for the court to decide without having fixed previously the law which governed their devolution. That, however, will not mean that the Soviet courts assume jurisdiction over the devolution of the assets. The only thing which a Soviet court will have to do in such a case is to ascertain what the respective foreign courts in fact have decided as to the devolution of the assets or what they would have decided in that respect if the matter had been brought before them for decision.[1]

What then is the question which an English court addresses to Soviet law in respect of the devolution of the English assets of a person who died domiciled in the U.S.S.R.? Is it: what would the Soviet court decide in respect of the assets taking into account their actual situation in England? Or is it: what would the Soviet court decide if the assets were situate in the U.S.S.R.? To the first question there will often be no answer at all; cases as to the devolution of assets situate outside the U.S.S.R. are not cognizable by the Soviet courts only because their late owner was domiciled in the U.S.S.R. from the point of view of English law. The answer to the second question will undoubtedly be that a Soviet court would apply to the assets Soviet municipal law although Soviet law does not claim to govern the devolution of assets situate in England.

[1] If the last residence of the deceased was outside the U.S.S.R., there seems to be no machinery to make the administration or distribution of his foreign assets cognizable by any Soviet court unless the authorities of the place where the assets are situate are ready to hand them over to the local Soviet consul to be dealt with by him in accordance with Soviet law. *Quaere* if the last residence of the deceased was within the U.S.S.R. In an opinion given in 1923 in reply to an inquiry from the State Bank, the Commissariat of Justice of the R.S.F.S.R. pointed out that Soviet Russia, which deals with assets of foreigners situate in Russia in accordance with Soviet law, cannot consistently deny the right of Latvia to deal with assets of Soviet citizens situate in Latvia in accordance with Latvian law.

In order to appreciate the importance of the problem the peculiarities of the Soviet law of succession must be taken into consideration. Soviet law started by completely abolishing inheritance, whether on intestacy or under a will. In 1922 inheritance was again recognized by Soviet law as a legal institution, but only on sufferance. The only persons entitled to take on intestacy are the deceased's surviving spouse, children, and grandchildren, plus those who, having no means of their own, had been maintained by the deceased at least during the year preceding his death. The personal chattels go to those of them who lived with the deceased; the remainder is divided between all of them in equal shares. If there are no persons entitled to take, the property becomes *bona vacantia* and as such goes to the State. The persons qualified to take under a will are the same as those taking on intestacy (plus the State, the Communist party, the Trade Unions, and some other public and co-operative bodies), the main difference between a will and an intestacy being that in a will the testator has the right to distribute his property amongst those who would take on his intestacy in shares at his discretion and not necessarily in equal shares. For instance, a man may bequeath his whole property to his wife or to one of his grandchildren or to one who having no means of his own had been maintained by him at least during the year preceding his death, to the exclusion of all others. A mother, a father, a brother, a sister, a friend, unless they satisfy the conditions of maintenance, are incapable of taking anything either on intestacy or under a will.

It is submitted that exactly because only the transfer of the English assets into the U.S.S.R. is capable of guaranteeing an answer from the Soviet courts in any case as to what is to be done with the assets—just because of this the question which the English court addresses to the Soviet court in respect of the movables of a person who died domiciled in the U.S.S.R. must always contain this finding, namely, the situation of the assets within the U.S.S.R. Either the English rule that succession to movables is governed by the law of the domicil must be limited to cases when the court of the domicil would be ready to exercise jurisdiction in the actual circumstances of the case, or the question of the English court to the court of the domicil must be framed in such a way as to give that court jurisdiction from its own point of view, which means that the question must assume all the facts on which such jurisdiction is conditional. The above rule is in fact unlimited. English law refuses to be satisfied with a negative answer from the court

of the domicil—with a mere disclaimer by that court of any jurisdiction or authority over the case. English law presses the court of the domicil for a positive answer as to what is to be done with the English assets. Take away the assumption that a positive answer to this question can always be obtained from the court of the domicil, then the whole structure of the English doctrine of renvoi will fall to the ground.

English law, as interpreted by Dicey and in *In re Ross* (and a little later in *In re Askew*, [1930] 2 Ch. 259) claims that it has succeeded in solving the problem of escaping the so-called *circulus inextricabilis* even though its reference to the law of the domicil covers the whole law of the domicil, including its rules of private international law. And indeed it has solved the problem—at the price of its own *capitis diminutio* in the sphere of jurisdiction, of raising the court of the domicil to the rank of the court of primary jurisdiction over the case, and of lowering the English court to the position of a court which has only to imitate the court of the domicil without asking for reasons. At the root of the whole matter lies the subordination by the English courts of their jurisdiction over the case to the primary jurisdiction of the courts of the domicil. The reward for such renunciation of primary jurisdiction in favour of the court of the domicil is the release from the responsibility for the choice of law, which responsibility passes to the court of the domicil together with the privilege of primary jurisdiction. Whatever is good for the court of the domicil becomes good for the English court. "In truth, the acceptance of the doctrine of renvoi by English courts is most intimately connected with their theories as to jurisdiction. Once admit that the courts of a particular country, e.g. Italy, have primary jurisdiction over a particular case, and it almost inevitably follows that when the courts of any other country, e.g. England, are called upon to determine such a case, they must try to decide it as an Italian court would decide it." (Dicey, at p. 869.)

Now the English law and the law of the domicil may disagree on the question of jurisdiction as they may disagree on the question of the domicil itself. English law may hold that the *de cujus* was domiciled in a certain country and may for that reason confer the primary jurisdiction over the devolution of his English assets on the courts of that country, but those courts may disclaim jurisdiction since they don't agree that the *de cujus* was domiciled within their jurisdiction or because they connect jurisdiction not with domicil but with something else, e.g. the situation of the assets.

What then? The answer of English law is that the disclaimer of jurisdiction by the court of the domicil in the English sense must be ignored as must be ignored its disclaimer of domicil. Notwithstanding that disclaimer, the English court must act as the courts of the domicil would act if they had jurisdiction.

Already in Dicey's arguments and in *In re Ross* the device of dealing with the English assets as the court of the domicil would have dealt with assets of the *de cujus* within its own territorial jurisdiction was clearly designed to prevent a mere disclaimer of jurisdiction by the court of the domicil and to compel that court to give some positive answer. In *In re Johnson*, [1903] 1 Ch. 821, Farwell J. held, *inter alia*, that it would be impossible for him to deal with the assets of the deceased as the Baden courts, the courts of the deceased's domicil in the English, but not the Baden, sense, would deal with them since "the Baden courts would in effect have disavowed him (the deceased) and disclaimed jurisdiction". Severely criticizing the judgment, Dicey points out that in fact "the deceased did leave property in Baden", and therefore "if the English court had pressed its inquiries a step farther than it did, and obtained information as to the way in which the Baden court did deal with the movable property of the deceased which was situate in Baden, the English court acting on the principle that it ought to act as though it were a court sitting in Baden, might, without difficulty, have distributed the movables in England in the same way in which the movables in Baden were distributed" (at p. 872). But what if the deceased left no property whatever in the country of his domicil in the English sense? The hypothetical Italian case cited above provides the answer: "It can hardly be impossible to ascertain how the Italian court would have dealt with property that he might have left in Italy." Whether or not the substitution of assets in Germany or Italy for assets in England is absolutely necessary when the problem is how to get an answer from a German or an Italian court as to what an English court is to do with English assets of a person who died domiciled in Germany or in Italy, such substitution may often be indispensable in cases when the *de cujus* was domiciled in the U.S.S.R.

In *In re Askew*, [1930] 2 Ch. 259, Maugham J. considers the hypothetical case of a dispute in England concerning the English assets of John Doe who died domiciled in Utopia. After having laid it down that the English court must apply to the case the whole law of Utopia, including her rules of private international law, the learned judge continued: "It is, I think, a misunderstanding

of the problem to suggest that this leads to a deadlock. Like others before me, I have spoken of the *lex domicilii* as applying to John Doe; but it should not be forgotten that the English court is not applying Utopian law *as such*, and the phrase is really a short way of referring to rights acquired under the *lex domicilii*. The inquiry which the court makes is, of course, as to Utopian law as a fact, and one to be proved in evidence like any other. The inquiry might accurately be expanded thus: What rights have been acquired in Utopia by the parties to the English suit by reason of the *de facto* domicil of John Doe in Utopia? For the English court will enforce these rights, though, I repeat, it does not, properly speaking, enforce Utopian laws. It is evident that, so stated, the question involves this. Have the parties acquired rights in Utopia by reason of the personal law of John Doe being English local law or Utopian local law? There is this alternative and no other." It is respectfully submitted that unless the question addressed by the English court to the law of the domicil is accompanied, or qualified, by some finding, real or fictitious, capable of connecting the case somehow with the country of the domicil from that country's own point of view so as to give her courts jurisdiction, there can be other alternatives. There is the possibility visualized already by Farwell J. in *In re Johnson*, namely that the law of Utopia will disavow John Doe and disclaim jurisdiction over his English assets altogether. It may be useless to inquire from a Soviet court: "what rights have been acquired in the U.S.S.R. in respect of the English assets of John Doe by the parties to the English suit by reason of the *de facto* domicil of John Doe in the U.S.S.R." To a question so framed the answer may be: "none whatever, by any party in the world." The question must be framed in such a way as to give the court of the domicil jurisdiction, or, in other words, it must assume all the facts on which such jurisdiction depends. The device of transferring the assets into the territorial jurisdiction of the court of the domicil, which seems to be useful in respect of various legal systems, may in many cases be indispensable in respect of Soviet law.

The conclusion, therefore, seems to be inevitable that English movable assets of persons domiciled in the U.S.S.R. in the English sense are always governed in an English court by the Soviet municipal rules of succession although, international treaties and other arrangements apart, Soviet law itself does not pretend to govern the devolution of any assets situate outside the U.S.S.R. This conclusion affects, *inter alios*, the vast majority of Russian refu-

gees. An ordinary Russian refugee is neither a Soviet citizen nor a person domiciled in the U.S.S.R. in the Soviet sense. He left Russia, the country of his domicil of origin, because of his unwillingness to be governed by its laws as they are now. However, he left her with the intention of returning to her so soon as the causes ceased to operate which had driven him from her. Therefore, so long as no other facts can be established in respect of him except his long and continued residence in some other country, he remains domiciled in the U.S.S.R. in the eyes of English law (*De Bonneval* v. *De Bonneval*, 1 Curt, 856–70). The direct result is that a Russian refugee is incapable of making a will in respect of his English movables otherwise than within the narrow limits of Soviet law. Indeed, it is doubtful if he is capable of making a will at all. In the eyes of Soviet law a refugee is neither a Soviet citizen nor a foreigner, and is therefore incapable of enjoying civil rights in either capacity; but, the right to make a will is a civil right. It has been ruled by the Commissariat of Justice of the R.S.F.S.R. that, being neither a Soviet citizen nor a foreigner, a refugee is incapable of taking anything either under a will or on intestacy in Russia. Logically, the same must be true in respect of English assets of persons domiciled in the U.S.S.R. in the English sense, in so far as those assets are to be treated by an English court as a Soviet court would treat them if they were situate within the U.S.S.R.

THE QUESTION OF CLASSIFICATION ("QUALIFICATION") IN PRIVATE INTERNATIONAL LAW.[1]

By W. E. BECKETT

I. *Introduction*

1. The rules of Private International Law, whether in relation to the choice of law or to jurisdiction, consist almost entirely of a series of short principles such as: "Procedure is governed by the *lex fori*"; "Succession to movables is governed by the personal law[2] of the deceased at the time of his death, and to immovables by the *lex rei sitae*"; "A court of the country in which the parties are domiciled has jurisdiction to entertain proceedings for the dissolution of a marriage." Other rules depend upon whether the cause of action is in contract or in tort. All these rules involve the use of conceptions of analytical jurisprudence, viz. procedure, succession, movables, immovables, capacity, form, contract, tort, &c. In every case which involves a question of Private International Law the court is called upon to decide whether a given state of facts, or a rule of law and the right resulting therefrom, falls into one or other of these conceptions or categories of analytical jurisprudence. It is this process—involved in every case—which I describe by the English word "classification", and which in French legal literature is described by the word "qualification".[3]

2. Private International Law is in a sense the antithesis of universal unification of law. Its *raison d'être* is the existence in different countries, and sometimes within the same country, of different systems of law. It arises because, international intercourse being as great as it is, all countries have found it impossible in the interests of good order and justice to adopt the position

[1] This article is based on a special University lecture delivered by the writer at King's College, London. A number of footnotes have been added and other additions made to the text, but otherwise the form is unchanged; hence the use of the first person, &c.

[2] i.e. under Anglo-Saxon Private International Law the law of the domicil, and, under most European continental laws, the law of the nationality.

[3] Dean Falconbridge in an article in the Canadian *Dominion Law Reports* (1932, 4 D.L.R. 9) on "Conflicts of Laws as to Nullity and Divorce" uses the expression "characterization" to describe this process—a word, which I think does convey the meaning intended. Dr. Lorenzen in his article in the *Columbia Law Review* (1920, p. 247), "Qualifications and the Conflict of Laws", uses the word "qualifications" in English, but the English word "qualifications" seems to me to convey quite a different meaning and to be inappropriate in this sense.

either of deciding all cases according to their own internal law exclusively, whatever the international elements involved, *or* of refusing to allow their courts to entertain any case which involves an international element. They have been forced, in the most obvious interests of justice, in order to deal with cases involving an international element, to evolve rules determining:

(i) in what cases their own courts shall and shall not entertain proceedings;

(ii) in what cases they will recognize the courts of a foreign country as having been competent;

(iii) which of the different systems of internal law shall be applied in order to ascertain the rights of the parties in different sets of circumstances.

The result is that where, under these rules, a foreign court has been held to be competent or a foreign law to be applicable, a state recognizes, and to a more limited degree enforces, in its own territory rights acquired under a foreign law. Hence the general theory of "acquired rights" as the basis of Private International Law, a theory whose merits I do not wish to discuss, save to make two short observations. The first is that, in order to ascertain whether any, and if so what, rights have been acquired under a foreign law, it is necessary that the rules of Private International Law should have been applied. It is not possible for an English court to say that a right has been acquired under French law until the English court has determined that French law is applicable. The second is that, unless the whole theory is to be reduced to an absurdity, it is essential that an English court, purporting to recognize or enforce a right acquired under French law, should apply the rule of French law in question in a case where, and in the same manner as, a French court would apply it. It is obviously ridiculous for an English court to purport to be recognizing a right acquired under a particular rule of French law when, in similar circumstances, a French court would hold this rule to be inapplicable or to mean something entirely different. Such a procedure, in my view, is not applying French law at all, but something which is neither French nor English law.

3. The rules of Private International Law are often referred to under the title "Conflict of laws", but in fact they are rules for avoiding conflict of laws by determining the sphere of application of each legal system. If all countries of the world possessed exactly the same rules of Private International Law—an ideal which is very far from being realized—then, subject to the three factors

mentioned below, and leaving out of consideration differences due to the relative skill of judges and advocates, there would never be, in fact, any conflict of laws, because, in whatever country the action was brought, a judgment would never be given which would conflict with the judgment which would be delivered if the suit were brought in another country. The real conflict of laws, as I understand it, arises in cases where the proceedings are brought, for instance, in France, and a judgment is given which is in conflict with an English judgment or with the judgment which would have been given if the proceedings had been brought in England. There are, however, three factors militating against the elimination of this conflict, even in an ideal world where one set of rules of Private International Law is universally applied. These factors are:

(*a*) In certain cases different rules of procedure (however narrow a definition is adopted for the procedure) will produce a different result.

(*b*) Public policy (*ordre public international*) cannot be eliminated entirely, and public policy must necessarily differ to some extent in different countries.

(These first two factors, however, should not, when reduced to their proper proportions, result in many cases of conflict.)

(*c*) The application of uniform rules of Private International Law will involve in each case the process of classification, and the question of jurisdiction or the choice of the internal law to be applied depends on the decision as to the analytical conception or category into which a given rule of internal law or state of facts falls. If, therefore, a French court would hold a given rule of Scottish law to be one of substance and the English courts were to consider it a matter of procedure, they would apply, in a case which involved this Scottish rule, a different one of the unified rules of Private International Law and reach conflicting conclusions. This conflict is referred to in French legal literature as *conflit de qualifications*. Conflicts of classification have in fact arisen frequently in practice, and I shall refer later to one or two striking examples. The object of the present study is to consider the manner in which the problem of classification is and should be approached by the court, and the extent to which it is true that conflicts of classification are inevitable. M. Bartin, the first French jurist to make a scientific study of the problem, maintains that, owing to conflicts of classification, it is impossible to expect anything like the elimination of conflicts of law in the real sense, even

on the basis of universal rules of Private International Law.[1] One's views of the frequency and inevitability of conflicts of classification depend on the theory adopted as to the manner in which a judge should deal with a question of classification.

II. *General theories as to the manner in which questions of classification should be approached*

(*a*) *Classification on the basis of the internal law of the forum.*

4. In considering this question it is convenient to begin with M. Bartin's "Théorie des qualifications" and the grounds upon which it is put forward by him and other eminent jurists, such as M. Arminjon and MM. Pillet and Niboyet, who have adopted it. The summary which follows is perhaps rather a summary of the views of these four authors than an exact statement of the views of any one of them.[2,3] According to this theory, a court, in dealing with the question of classification, must always (subject to certain exceptions) decide the matter on the basis of the conceptions of its own *internal* law. In classifying a rule of foreign law, where there exists a corresponding rule in the internal law of the forum, the judge will classify the foreign rule in the same way as the corresponding rule of his own law is classified. Where there is no

[1] The title of the brilliant articles, which he wrote in 1897, is "De l'impossibilité d'arriver à la suppression définitive des conflits de loi", *Clunet*, 1897, p. 225. M. Bartin has since evolved his "Théorie des Qualifications" which is to be found in its latest form in his *Principes de droit international privé* and in his lectures in the *Recueil de l'académie de droit international*, 1930, Vol. I, pp. 565–620. The German jurist Kahn was apparently the first to call attention to the problem and to formulate a theory upon it. His original theory was similar to that of M. Bartin, but he appears to have changed his views later.

[2] I have taken M. Bartin's theory from his lectures in the *Recueil de l'académie de droit international*, 1930, Vol. I, p. 565 *et seq.*, and those of MM. Pillet and Niboyet from their joint *Manuel de droit international privé*, 1924, pp. 373–6.

[3] The views of M. Arminjon are taken from his *Précis de droit international privé*, 2nd ed., Vol. I, pp. 128–48. He has also dealt with the subject—incidentally but most interestingly—in the course of lectures given by him for The Hague Académie de Droit International, which will appear in the *Recueil* for 1933. I am most indebted to him for his courtesy in letting me read these lectures in proof. Though M. Arminjon *formally* adopts the same theory as M. Bartin, he appears to me (*a*) to interpret it so broadly that *in practice* I think his views are not so far away from those advocated in this article, and (*b*) to recognize and state with the most admirable clarity most of the objections to classification on the basis of the internal law of the forum. M. Arminjon, I think, always says that the principles of classification must be sought in the *lex fori*. He does not appear to say "in the *internal* law of the forum", as M. Bartin does. But the difference is essential. If the *lex fori* means the Private International Law of the forum, I agree. The question then is what the principles of this Private International Law should be and where they should be sought when a new point arises.

corresponding rule in the internal law of the forum, he must for this purpose make use of the most nearly analogous rules in the internal system of the forum and the manner in which they have been classified.[1] The grounds for this theory are as follows:

(i) Where an English rule of Private International Law directs the English court to apply the personal law in matters of capacity or for the purpose of succession to movable property, this English rule can only mean that the foreign personal law should be applied in England in those cases which can be considered according to English conceptions, as matters of capacity or succession, and not to matters which any foreign system of law may choose, however arbitrarily, to regard as such. If this is not so, English law loses all control over the application of its own rule, which may become extended in a manner which can never have been intended by those who framed it. English conceptions of capacity or succession

[1] As an example of M. Bartin's theory, it is convenient to refer to the *Maltese marriage* case. It is a case which he himself cites for this purpose and which he has made a *cause célèbre* in Private International Law. (Decision of the Court of Appeal of Algiers, December 24, 1889: *Clunet*, 1891, p. 1171.) Under French Private International Law: (1) succession to immovables on death is governed by the *lex rei sitae*; (2) the rights of husband and wife to property arising out of the "régime des biens entre époux" is governed by the law of the "domicile matrimonial" (i.e. in the absence of express contract, the law of the country where it was their intention to establish themselves at the time of their marriage). Two Maltese, after marrying in Malta and residing there some time, came to live in Algeria and the husband acquired land there. The question was what were the rights of his widow in respect of this land. At the time (1889) a surviving wife had, under French internal law, no rights of succession as heir over the property of her deceased husband, but, if the "régime des biens" had been governed by French internal law, she could have claimed half the land as property acquired in common. But the "régime des biens" in this case was governed by Maltese law and Maltese law gave the widow (*a*) half of the common property (acquêts) and (*b*) a right of survivorship consisting in one-quarter ("le quart du conjoint pauvre") of the assets left by the deceased. The question was whether the widow could claim (*b*) in respect of this land in Algeria. If this right could be classified as part of the "régime des biens" then as this régime was governed by Maltese law, it would apply to this land in Algeria. But if it should be regarded as a right of succession—like the right of an heir—it did not apply because the rights of succession were governed by French law. In Maltese law (I take these two statements from M. Bartin, *Recueil de l'académie de droit international*, 1930, Vol. I, p. 373) this "quart du conjoint pauvre" was regarded as part of the "régime des biens" but in French internal law "la communaute légale des biens" gave no such right of survivorship, and this Maltese right of survivorship (one-quarter of the husband's assets) could only be held to be analogous to the "conventions spéciales de préciput" (preferential legacy stipulated in marriage contract) of French internal law and therefore as a right of succession. Therefore, argues M. Bartin, a French court must classify this "gain de survie" according to French internal law and hold it to be a right of succession and therefore in this case inapplicable to land in Algeria. But in fact the French Court of Appeal did the opposite. It held the "gain de survie" to belong to the "régime des biens". It based this conclusion on the manner in which this right was classified in the Maltese Code (see p. 1174 of the report in *Clunet*) and never said a word about its analogies in French internal law.

must be ascertained by looking at English internal law and seeing what is the nature of its rules with regard to capacity and what institutions it recognizes as having the character of succession.[1]

(ii) The question of classification has to be decided before it can be ascertained that any, and if so which, foreign law is applicable. It is, therefore, wrong to have recourse to the classification adopted in any foreign law before it has been decided whether this law is applicable at all.[2]

(iii) Where the question which the English court has to decide is whether to apply French or German law, and this depends upon how a given set of facts or rule of law is classified, there is no valid reason why the English court should adopt the French classification as opposed to the German, or vice versa, if, as may well happen, they conflict. It therefore must classify according to its own legal conceptions and disregard the classifications of German and French law.[3]

(iv) In the process of classification an English judge cannot help deciding the matter according to English legal ideas because they form the basis of his whole legal training.

(v) The rules of English Private International Law and internal law form part of the same system of law: one must therefore be interpreted in the light of the other.[4, 5]

5. To this general principle of classification on the basis of the internal law of the forum, M. Bartin (I am not sure that all those who adopt his first principle go so far in this respect)[6] formulates a second qualifying principle—he would not call it an exception to, but a logical deduction from, the first—which restricts the application of his first principle. This second principle is that once

[1] "Pour résoudre les conflits de lois que fait naître le jeu de certaines institutions, nous ne pouvons le faire en France qu'en tenant compte du droit interne français sur ces institutions-là. Nous ne pouvons, pour résoudre ce conflit international de lois, nous inspirer que du droit interne français." Bartin, *l.c.*, p. 568. See also Arminjon, *l.c.*, pp. 133–4.

[2] See Arminjon, *l.c.*, p. 136.

[3] Arminjon, *l.c.*, p. 136. He refers to the *Maltese marriage* case in this connexion (p. 50, n. 1 above), but it is not a good example. The question there was whether a given claim based on Maltese law as the law governing the "régime des biens" could be admitted. Even if admitted, it did not exclude application of French law as the *lex situs* governing the succession though it might leave very little property in fact for this law to operate upon. A better example is the question whether a contract made by post is concluded in France or Italy—question falling to be decided by an English judge (see para. 12 below); or the question of a holograph will made by a Dutch national in France—question to be decided by a German judge (see p. 73, n. 1).

[4] See Silz, *Du domaine d'application de la règle "locus regit actum"*, p. 29, note (i), and p. 30, note (i).

[5] See Pillet and Niboyet, *l.c.*, p. 376.

[6] See Arminjon, *l.c.*, p. 142 *et seq.*

an English court has ascertained, by means of the application of the relevant rule of Private International Law and by such classification according to principle No. 1 as is necessary, that the matter under consideration is governed by French law, then the English judge should apply French law as it is applied in France, including such subsidiary classifications as may be involved.[1] This second principle is a generalization from instances such as the following: (*a*) Assume a rule of Private International Law that civil liability for tort is governed by the law of the country where the tort is committed. The question whether the claim is one for civil liability and is one based on tort is decided according to the principles of the internal law of the forum. When once this has been ascertained, however, the whole question of liability, including, for instance, the vicarious liability of principal for agent or master for servant, must be determined according to the conceptions of principal and agent, &c., of the *lex loci delicti commissi*.[2] (*b*) In contractual cases the international rule is that the contract is governed as to its interpretation by that law which the parties are presumed to have intended. The question whether it is a case of contract is decided according to the *lex fori*. Once the court has ascertained that it is a case of contract and that the parties intended it to be interpreted according to French law, all the sub-classifications which may arise in connexion, for instance, with the place where the contract is to be deemed to have been concluded, &c., must be determined in accordance with the conceptions of French law. (*c*) Assume a rule of Private International Law that the *lex rei sitae* governs the manner in which property can be transferred or disposed of, and assume that it is ascertained that the property is situated in France, the English judge would apply French law in order to determine whether the property in question—whether for the purposes of succession or otherwise—should be considered as immovable or movable property,[3, 4] because the manner in

[1] Bartin, *l.c.*, p. 396 *et seq.*

[2] As to English law on this point see Foote, 5th ed., p. 523, and case of *General Steam Navigation Co.* v. *Guillon*, 11 M. & W. 279. It would appear that this view accords with English law.

[3] This last instance is clearly in accord with English law; see Dicey, 5th ed., pp. 579–82, and cases there cited.

[4] Another instance given by M. Bartin is the following: Article 999 of the Civil Code provides that a French national can make a will abroad "en la forme authentique de la loi locale". A Frenchman makes a will in England in the English form. "Forme authentique" as understood under French internal law requires the intervention of a public official, but this is not possible in England and a will executed in the presence of witnesses is the most formal way of making a will there. The French courts have held

which property can be disposed of may depend on whether it is movable or immovable.

6. I take this theory of classification as my starting-point because:

(*a*) It appears, at any rate at first sight, to derive considerable support from the actual practice of the English courts[1] and, to some extent, so far as I have been able to ascertain, from that of other countries.

(*b*) It still enjoys to a greater extent than any other general theory the approval of jurists, though it is probably now losing ground.

(*c*) The reasons, upon which it is based, seem at first sight extremely cogent—indeed almost conclusive.

(*b*) *Objections to the principle of classification on the basis of the internal law of the forum.*

7. There are, however, some very serious objections to this theory. The more closely it is examined in the concrete the less satisfactory it appears. To take first the logical reasoning on which it is based. Arguments (ii) and (iii) are serious arguments against the adoption of the opposite theory, namely classification on the basis of the law of any other particular country—the foreign law applicable (see para. 9 below)—but do not necessarily point to classification on the basis of the *internal* law of the forum. No. (iv) as a practical argument possesses some truth and probably accounts for many decisions, but it is not really a valid argument as to what *ought* to be the method employed. The force of arguments Nos. (i) and (v) can best be considered later when the objections to M. Bartin's theory and possible alternatives to it have been considered.

8. M. Bartin bases his theory upon French jurisprudence, but (*a*) in none of the French decisions, which are referred to by him and other supporters of this theory, have I found any instance where the court expressly classifies a rule of foreign law by reference

that in the circumstances the test of "authenticity" must be based on English and not French internal law and have accepted wills by Frenchmen made in the English form as valid.

[1] Viz. the classification of consents necessary for marriages (paras. 27–9 below) and of foreign rules of limitation (para. 25 below). Dr. Lorenzen (*l.c.*, note (3)) considers that M. Bartin's theory is in accord with English and United States jurisprudence. See also Dicey, 5th ed., p. 44. Both Dr. Lorenzen and Dicey are, however, referring particularly to the limited class of cases discussed in para. 12 below.

to French internal law—in general the judgments simply say that the rule falls into this or that category; (*b*) in some cases the French courts appear expressly and in other cases by implication to have classified a foreign legal rule, not according to French internal law, but rather by reference to the manner in which that rule is characterized in the law of the foreign country concerned.[1] There are certainly German decisions in both senses[2] and some English cases which do appear to support his view.[3] Secondly, the theory accepts, as being inevitable and frequent, conflicts of laws due to conflict of classification and there is no doubt that this theory is one which, if universally applied, would, more than any other, lead to conflicts of classification. Thirdly, and this is to my mind an even more serious objection, a logical application of the theory would result in an English court, through classifying a French rule in a manner different from that in which it is classified in its country of origin, not merely refusing to apply French law when according to French ideas it should be applied, but also applying French law in cases where, according to French ideas,

[1] Viz. the *Maltese marriage* case (p. 50, n. 1, *ante*). Further it would seem that the French courts have shown a disposition to accept, as a matter of personal status and capacity, rules of foreign law which were so regarded in that legal system, although, according to such evidence of the conceptions of French internal law as is to be found in French jurisprudence, these rules ought to have been regarded as falling into another category, such as the *form* of acts, or procedure. *Vide*, for instance, the famous *Arrêt Levinçon*, *Clunet*, 1905, p. 1006, and the *Leeuwn* case, *Clunet*, 1928, p. 707. The *Levinçon* case (religious divorces of Russian Jews) is a decision of the Cour de Cassation and is criticized by Pillet and Niboyet precisely on the ground that the court adopted the foreign and not the French classification (*l.c.*, p. 665): the *Leeuwn* case, relating to the much-discussed Article 992 of the Netherlands Civil Code, forbidding Dutch nationals to make wills, even when abroad, otherwise than in the "forme authentique", can, however, be explained on another ground, viz. the *locus regit actum* rule in regard to wills in French Private International Law is subordinate to the personal law where the latter has an imperative provision with regard to the forms of wills made abroad; but in the *Quartin* case (*Sirey*, 1847, Vol. I, p. 712) the Cour de Cassation had taken the opposite view with regard to the French holograph will of a British subject. Arminjon (*l.c.*, p. 137) frankly admits the large number of judicial decisions against his view. In the case cited by Pillet and Niboyet as an example of classification on the basis of the internal law of the forum (*l.c.*, p. 378), a decision of the Cour de Cassation classifying the right of "retrait successoral" as belonging to "dévolution héréditaire" (*lex domicilii*) rather than to "partage des biens" (*lex rei sitae*), (*Clunet*, 1909, p. 773), the Court made no reference to French internal law but simply said "le droit d'exercer le retrait successoral est inhérent à la qualité d'heritier".

[2] Viz. the German courts accept the English and United States classification of their own statutes of limitation as procedure, although according to German views they should in principle be regarded as substance (see para. 26 below): on the other hand, the German courts refused to recognize Article 992 of the Netherlands Civil Code as having a personal character (see p. 73, n. 1 below).

[3] See p. 53, n. 1 above.

that law is not applicable at all; in other words, applying a law which is not French or English, or indeed, the law of any country whatever. Though this result can be defended perfectly well on purely logical grounds, it is one which so offends common sense that courts of all countries have struggled, and I think always will struggle, against it, and rightly so. It was this difficulty, together with the desire to minimize real conflicts of law, which seems to me to have led to and to be the real main justification for, the adoption of the "renvoi", and it is significant that, in spite of the preponderance of argument against it in the writings of logically minded authors, the courts of nearly all countries still to a greater or lesser extent do admit the renvoi.[1] The doctrinal arguments against the "renvoi" are much the same as those in favour of classification by the internal law of the forum, and the supporters of the latter are in general the most determined opponents of the "renvoi". It is clear that, if the renvoi is admitted, the sphere of M. Bartin's second principle, which diminishes the scope of his first and therefore the necessity of conflicts of classification, becomes at once proportionately wider. The theory of "vested rights" as the basis of Private International Law—a theory which English writers such as Dicey have adopted —requires the acceptance of the renvoi and of M. Bartin's second principle, but classification on the basis of the internal law conflicts with it.[2]

Fourthly, the classification of a foreign institution or rule, according to the manner in which the corresponding or analogous rule of the internal law of the forum is classified, seems to me to be likely to lead to the most arbitrary results even in those cases where a sufficiently close analogy in the *lex fori* can be found. A single example is sufficient to illustrate this. English law contains certain rules with regard to the consents necessary for the marriage of a minor. The English rule applies to all marriages in England, whatever the personal law of the parties, and does not apply to the marriages abroad of parties whose personal law is English. It is forbidden to celebrate the marriage of a minor

[1] I here use the word "renvoi" in a convenient but loose and inaccurate sense, to convey the meaning that the reference to a foreign law under a Private International Law rule is (in some or all cases) a reference to the whole of the law of the foreign country and not merely to its internal law. I am not using it in its more restricted and more accurate sense, which may be irreverently described as "stopping the game of legal tennis at the return of the service".

[2] M. Arminjon points this out in his lectures on the "Notion des Droits acquis", see p. 49, n. 3 above.

without these consents, but, if nevertheless a marriage is celebrated without them, the validity of the marriage is unaffected. Consequently, there is some reason for regarding the English rule as to consents as a matter of form rather than of capacity or the essentials of marriage. On the other hand, French law also contains provisions relating to consents for the purposes of marriage. The French rules apply, according to French law, to the marriages of French nationals at home or abroad. They do not apply to the marriages of foreigners in France. Failure to observe them involves the nullity of the marriage if the necessary proceedings are taken for this purpose. Now it is quite clear that, though both the English and French rules relate to the consents necessary for the purposes of marriage, their resemblance there ceases and in character they are in fact entirely different. M. Bartin's theory would appear to suggest that because the English rules as to consents are matters of form, therefore an English judge *must* hold the French rules also to be matters of form. Now there is some ground for stating that the English courts have classified the French rules as to consent as matters of form (I will discuss this more fully later),[1] but even English writers almost unanimously consider this to have been wrong.

My fifth and last objection to classification on the basis of the internal law of the forum as a general principle is that it breaks down entirely when the internal law of the forum has no rule or institution similar to that calling for classification, and the differences between the systems even of highly civilized countries, between whom there is a constant and regular intercourse, are so great that this is often the case.[2] The laws of most European countries have a most developed and complicated system of family law, containing rules and institutions entirely unknown to English law. Some of the most difficult questions of classification which have presented themselves to continental courts, arise out of the "régime des biens entre époux", i.e. the system of common property between husband and wife arising either out of a marriage contract or by the operation of law in the absence of contract. At the present day English internal law knows of no institution of the kind—a marriage settlement does not seem to me to afford a sufficient analogy. Further the "régime" between husband and

[1] Paras. 27–9.

[2] See Rabel, "La Problème de la Qualification", *Revue de droit international privé*, 1933, No. 1, pp. 1–62, where a very strong case against the principle is made out on this ground.

wife created by English law before the Married Women's Property Act 1882, which—speaking very broadly—vested all the wife's property in the husband and none of the husband's in the wife, was so unlike the system of "communauté des biens" that even here there is no real analogy. French Private International Law applies the national law to determine "les effets du mariage" (i.e the obligations of the spouses *inter se*), the law of the domicil of the deceased to determine succession on death, and the law of the original matrimonial domicil to determine questions arising out of the "régime des biens" and very fine questions have arisen as to whether a right belonged to the "régime des biens" or to succession or to the "effets du mariage". How is an English judge to determine this on the basis of English internal law, which knows no "régime des biens" at all? Is his classification of these foreign institutions to be different now because English internal law has changed so much since 1882? M. Bartin[1] says that, when there is no analogous system or rule in the internal law of the forum, it means that the foreign rule or institution must be so alien to the ideas of the forum that the judge would have to refuse to apply it on grounds of public policy. Though there is no doubt that this is so sometimes (viz. in particular in relation to types of incapacity unknown in the *lex fori*), M. Bartin's view might render it necessary for an English court to ignore altogether all continental systems of common property between husband and wife (a course which in fact the English courts have fortunately never adopted) and half the family law of these countries, a result which I do not think any French jurist would desire.[2]

[1] *Clunet*, 1897, p. 246. Arminjon, *l.c.*, p. 144, seems to think it is always possible to find analogies in the *lex fori*.

[2] English law appears when classifying foreign laws to have recognized a distinction between (*a*) succession as between husband and wife on death (*lex domicilii* at time of death), (*b*) restrictions on capacity due to coverture (*lex domicilii* at time question arises), (*c*) matrimonial property régime (law of original matrimonial domicil) (see Westlake, 7th ed., pp. 45, 72, 81; Foote, 5th ed., p. 104, and cases there cited) and in at least one case to have classified an English rule (marriage invalidates a will made before marriage) as falling into (*c*) rather than (*a*) (see *Re Martin*, [1900], P. 211, at p. 223. Jeune P. took the opposite view, but see Vaughan Williams, L. J., p. 240). Presumably most of the provisions of the Married Women's Property Acts fall into classes (*b*) or (*c*) and also the original common law rules, which still survive these Acts, rendering it impossible (in most cases) for the spouses to sue each other in tort and making the husband liable for his wife's torts. Consequently they only apply to spouses *either* domiciled in England at the time, *or* whose original matrimonial domicil was English. There is no space here to discuss the difficult question which of these two possibilities is the right one. The rules relating to the power of a wife, as the agent of her husband, to make contracts binding on him *might* possibly be classified differently.

(c) *The objections to the converse theory—classification of foreign law on the basis of the classification adopted in the foreign legal system.*

9. The obvious objections to M. Bartin's theory at once led jurists—notably M. Despagnet—to formulate the opposite theory,[1] namely that a foreign rule or institution should always be classified according to the manner in which it is classified in its country of origin. Though apparently sensible, and avoiding the objections to the other theory, I think that this view gives rise to equally serious difficulties. It must be realized that this view adopts the foreign classification, not merely for deciding the subsidiary questions which arise *when* the foreign law has been found to be applicable (M. Bartin's principle No. (ii)), but also to determine whether it is applicable at all, and, if this view is adopted, the only control over the application of its own rules of Private International Law which the court retains is the unsatisfactory one of "public policy". Further, as the following example shows, there is a class of cases where it will not work at all.[2] An English court, applying its own rule, holds that the interpretation of a certain contract for payment of a debt is governed by the *lex loci solutionis*. The debtor is in country A and the creditor in country B. The law of A holds that payment must be made at the domicil of the debtor; the law of B that it must be made at the domicil of the creditor. How is the place of performance to be determined by an English court? On Despagnet's principle the laws of A and of B have both equal claim to decide the question and therefore to be applied to interpret the contract. It furnishes no assistance in choosing which. If these two opposing views (M. Bartin and M. Despagnet) were the only possible ones I should agree with the French writer, M. Donnedieu de Vabres,[3] that the question of classification was incapable of solution by any satisfactory or logical principle whatever, but there is another alternative.

(d) *Suggested proper principle: classification on the basis of analytical jurisprudence and comparative law.*

10. The rules of Private International Law are rules to enable the judge to decide questions as between different systems of internal law—*either* between his own internal law and a given foreign law or between two foreign systems of law. These rules, therefore, if they are to perform the function for which they are designed,

[1] "Des conflits des lois relatifs à la qualification des rapports juridiques." *Clunet*, 1898, p. 253. [2] Example borrowed from Dr. Rabel. [3] *Clunet*, 1905, pp. 586–97.

must be such, and must be applied in such a manner, as to render them suitable for appreciating the character of rules and institutions of all legal systems. Classification is simply an interpretation or application of the rules of Private International Law in a concrete case and the conceptions of these rules must, therefore, be conceptions of an absolutely general character. As I have already said, these conceptions are borrowed from analytical jurisprudence, that general science of law, based on the results of the study of comparative law, which extracts from this study essential general principles of professedly universal application—not principles based on, or applicable to, the legal system of one country only. Classification must, I suggest, be based on analytical jurisprudence.[1] Another reason for this conclusion is that, in many cases, the judge must classify his own internal law. He cannot classify institutions of his own internal law merely on the basis of that internal law; he must have recourse to some more general principles outside it and these principles can only be those of general jurisprudence. It cannot be right to use one set of principles to classify the *lex fori* and others for foreign laws. I do not deny that even analytical jurisprudence may have something of a national character and that consequently a national judge will follow the ideas of his own country with regard to analytical jurisprudence. He will also follow the principles of the *lex fori* in cases where general jurisprudence can give no answer because different legislations are more or less equally divided and there is really no logical reason for adopting one view rather than another (e.g. questions as to the place where a contract by post is concluded, whether the place of payment is the residence of debtor or creditor, &c.). Analytical jurisprudence is, however, far less national than any other branch of law, and a judge, though naturally bound to follow, in a case to which it applies, an express direction of his own law with regard to the sphere of application of a rule of the internal law of the forum, is not necessarily bound to regard this direction as being one which affords any analogy for deciding any other case. He may well regard it as an exceptional rule based upon special reasons peculiar to his own country, and affording little or no evidence of the proper conceptions of analytical jurisprudence. I will

[1] This is the view of Dr. Rabel, *l.c.* (see p. 56, n. 2 above), the best treatment of this subject I have seen, and of Professor Meriggi ("Les Qualifications en droit international privé"; *Revue de droit international privé*, 1933, Vol. II, p. 201—though I should not myself adopt this last writer's theory of classification on the basis of the relative importance of the different rules of Private International Law). I had in fact reached this conclusion independently before reading these articles.

take another example to illustrate this point. In many countries, such as Greece, matters of personal status in relation to marriages are governed by religious laws, and, marriage being regarded in law, and not merely in religion, as a sacrament, a Greek judge is bound not to recognize the marriage of a Greek national of the Orthodox faith unless celebrated according to Orthodox rites; but, though the Greek judge is bound to hold any purely civil marriage of a Greek Orthodox national to be invalid, it does not appear to me to follow that he must therefore draw the conclusion that this rule is really one of status or capacity; if, as I think is the case, the general principles of analytical jurisprudence would show that the ceremonies necessary for a marriage must be considered to be a matter of form. He would not, therefore, draw the deduction that, because religious marriages performed in France are not recognized by French law, French nationals must be deemed to be under an incapacity to contract valid religious marriages even in foreign countries where this is the proper local form of marriage, nor need he necessarily be surprised if the courts of foreign countries do not (as in fact generally speaking they do not), refuse to recognize as valid the marriages of Greek Orthodox nationals contracted in the local civil form in spite of this rule of Greek law. He might say, I think, that this rule of his own law was an exceptional one, not in accord with the ordinary conceptions of analytical jurisprudence which are applied for the purposes of the application of rules of Private International Law, and therefore probably would not be recognized abroad. On the other hand, the courts of a country, in deciding questions of classification, may evolve some principles of more or less general application—I shall refer later to one adopted by the English courts—and these principles may be such as to apply to the classification both of the internal law of the forum and of foreign laws. These principles become part of the law of that country—but they are part of its Private International Law. It is not classification according to the Private International Law of the forum which I am contesting—it is, of course, obvious that the court must do this—but classification on the basis of institutions and rules of the internal law of the forum.

III. *Classification in practice*

(*a*) *Cases not involving any characterization of a rule or institution of internal law.*

11. After this short consideration of the question of classification from the theoretical side, it is useful to look at it more in the

concrete—and for this purpose I wish to divide the cases that may arise into three classes:

(*a*) Cases not involving any characterization of a rule or institution of internal law.

(*b*) Classification of rules or institutions of the internal law of the forum.

(*c*) Classification of rules or institutions of foreign internal law.

12. My first class of cases consists of those which do not involve the appreciation of the character of any rule of internal law, but simply the application to a given set of facts of a conception of Private International Law. The examples of these cases which have occurred to me all relate to the question of jurisdiction, but it is clear that they do not cover all cases where the matter of jurisdiction has to be decided.[1] For instance, an English court has, under its rules of Private International Law, jurisdiction in divorce where the domicil of the parties is in England. The English conception of domicil differs materially from, for instance, that of French law; but an English court will always decide the question in accordance with the English conception of domicil. Similarly, where an English court has to decide whether it will recognize a French decree of divorce, a recognition which is given if the parties were domiciled in France, it will decide the question of domicil according to the English and not the French conception.[2] The position is the same if the question of domicil has to be determined for the purpose of the distribution of movable property on death.[3,4]

[1] Questions of jurisdiction—whether that of the jurisdiction of the forum or of a foreign court—may involve the classification of rights arising under foreign law (viz. whether the claim was in contract or in tort, &c.). In these cases I see no reason for adopting any other principle of classification than in cases of choice of law, though no doubt the necessity to characterize foreign law is much rarer for determining jurisdiction than for the purpose of choice of law. I note, however, that Dr. Rabel says (*l.c.* p. 39), "Pour la compétence judiciaire l'application de la *lex fori* va de soi", but I am not sure if he had these cases in mind.

[2] But as an English court will recognize any divorce which is recognized by the law of the domicil (whether pronounced by the courts of that country or not), the resulting conflict will, in many cases, be avoided, viz. if the parties were in the English sense domiciled in Belgium and the Belgian courts would recognize the French decree. I am tempted to describe this position by the use of the word "renvoi" in a loose and inaccurate sense (see p. 55, n. 1). The acceptance of this principle does in many cases, though of course not in all, avoid conflict.

[3] For the exclusive application by the English courts of the English conception of domicil, see *In re Martin*, [1900] P. 211, 227, *In re Annesley*, [1926] I Ch. 692. (*B.Y.B.*, 1927, pp. 188, 195).

[4] The French courts appear to determine the question of domicil exclusively by use of the French conception where domicil in France is in question, but the jurisprudence appears to be very conflicting as to the conception to be applied where the question

To take another instance, the English court possesses jurisdiction to decide any cases arising out of contract where the contract was concluded in England and in this case it is perfectly clear that the question whether the claim arose out of a contract and the question where the contract was concluded would be decided according to the English principles. A contract by correspondence would be regarded as being concluded at the place where the acceptance was given, as opposed to the place where the acceptance was communicated. Suppose, however, that English Private International Law possessed a rule under which the jurisdiction of foreign courts was recognized in contract if the contract had been concluded in the country concerned, that the question was whether the contract was concluded in Italy or in Germany, and both Italian law and German law adopted the principle that the contract must be deemed to be concluded at the place where the acceptance was communicated,[1] and jurisdiction had been assumed by the Italian court in virtue of this principle. Then in this case I think that, as the question lay between Germany and Italy, and the laws of both these countries agreed in holding that the contract was concluded in Italy, an English court should and probably would recognize the jurisdiction of the Italian court on the basis of the contract having been concluded in Italy, although according to the English rule the contract would be held to have been concluded in Germany. But if Italian and German law differed on this point, then I think the English court could only follow its own rule because on this matter there cannot be said to be any rule of general jurisprudence.

Where the case arises out of a transaction or events taking place in France, and the question is whether it should be considered to be a case of contract or of tort, a very difficult question sometimes (e.g., claims against employers arising out of legislation similar to the United Kingdom Workmen's Compensation Acts), the question is one of the classification of institutions of French law and falls outside the class of cases which I am considering at the moment.[2] The conclusion which I draw is that

is the domicil of a foreigner in a foreign country (see *inter alia* Pillet and Niboyet, *l.c.*, p. 531 ; Lorenzen, *l.c. supra* (p. 46, n. 3).

[1] Italian law does adopt this principle. I am not sure about German law.

[2] Pillet and Niboyet (*l.c.*, pp. 606–8) quote a dceision of the French Cour de Cassation dealing with claims under the French law of 1898 (as modified in 1905) with regard to industrial accidents to the effect that "les accidents du travail, se rattachant au contrat de travail, sont donc soumis à la loi française dès lors que cette loi régit le contrat de travail" (*Affaire Antipoul*, Sirey, 1923, Vol. I, p. 33). The employer's liability exists

in this class of case a court must always apply the conceptions of the *lex fori* and must disregard the conceptions of foreign laws on these points.[1] The only exception which can be made is where it is clear that upon the application of any conception the courts or law of one of two foreign countries must be competent and the two

under French law (as under the English Workmen's Compensation Acts) "même en l'absence de faute" and is regarded as a statutory consequence of the contract of employment as if the provisions of the law were to be deemed to be obligatorily inserted in every contract of employment governed by French law. Thus the Cour de Cassation appears to have characterized this liability as being of a contractual rather than a tortious character. The English Workmen's Compensation Acts apply (or have been interpreted as applying) to accidents happening in England, and the proper law of the contract of employment is treated as irrelevant as regards their application. Therefore it is necessary to regard them as creating a liability more akin to tort than to contract, on the analogy of these cases of absolute liability independent of negligence (*Rylands* v. *Fletcher*, &c.). If, however, an English court had to classify a similar claim arising out of an employment in France and corresponding French legislation, I see no reason why an English court should not accept the French classification of the claim, although it might regard its own English workmen's compensation claims as being tort rather than contract. M. Bartin's theory appears to me to suggest the contrary conclusion based on the view which the English court would take of its own workmen's compensation legislation, but as the two legislations, although having generally the same object and perhaps much the same character, are certainly not exactly the same, the argument by analogy seems to me to lead to fallacious conclusions. Where the French classification of a French rule is not clearly contrary to the general principles of analytical jurisprudence as understood in England (as in the particular case I do not think it would be), it seems to me that the English courts should accept the French classification of a French rule of law. The two decisions of the Privy Council, *Walpole* v. *the C.N.R.*, *MacMillan* v. *the C.N.R.*, [1923] A.C. 120, show that the classification as tort of claims under the English Workmen's Compensation Acts (and corresponding legislation in other parts of the British Empire) is not complete, because claims under those Acts arising in one part of the British Empire are held not maintainable in another, under the English rule of Private International Law with regard to torts, on the ground that they are independent of any act *wrongful* by the *lex loci actus*. With great respect to this high tribunal, I think that it might have been preferable to interpret the rule of Private International Law more broadly rather than to base the decision on a literal following of statements of the rule in old cases where the judges were not dealing with, and could have had no idea of, statutory liabilities of this kind at all—statements which were in fact directed to the undesirability of giving damages in England for an act which created no liability at all in the place where it happened. *Batthyany* v. *Walford*, 36 Ch. D. 269, is an interesting case from the point of view of classification. The liability under Austrian law of the holder of a life interest in entailed land in Austria for "waste" or "dilapidations" was held to be quasi-contractual rather than tortious. It might be thought at first sight that in this case the English court classified on the basis of English internal law, but I do not think that this is correct. The question arose on the application of the principle *actio personalis moritur cum persona* which being regarded as a rule of procedure (see para. 20 below) would have barred the claim if it was one in tort. The English decisions with regard to waste and dilapidations, &c., were cited in order to show that this principle, as a principle of English procedure, did not apply to all claims not arising out of express contract, but only applied to claims which were clearly pure tort, and not to determine the character of the Austrian rule.

[1] Cp. Dicey, 5th ed., p. 44.

foreign laws are in agreement in following a conception different from that of the *lex fori*, and in these circumstances a court might in effect, if not in form, adopt the foreign conception by the application of a principle analogous to that of the renvoi.

(*b*) *Classification of the Internal Law of the Forum.*

13. In considering the classification by an English court of the rules of English internal law I shall deal almost exclusively with the classification of the provisions of statute law. This is purely as a matter of convenience, because the problem and the approach to it seem to me to be in essence the same if it arises on a Common Law rule.[1] The vast majority of English Acts of Parliament lay down provisions without giving in the text of the Act any indication as to the manner in which the Private International Law questions which arise on their application should be solved. It seems as if (and I think it is probable in some instances that it is actually the case that) neither Parliament nor the draftsmen of the Act have given any thought to these questions.[2] To quote a simple example, a recent Act, the Age of Marriage Act, 1929, provides that

"A marriage between persons either of whom is under the age of sixteen shall be void."

Now this Act may mean any one of the following three things:

(i) That a marriage celebrated in the United Kingdom is void if one of the parties is under sixteen, irrespective of the personal laws of these parties. If this is its meaning, the rule is a rule of purely territorial application.

(ii) That a marriage contracted by any person whose personal law is English, Scotch, or Northern Irish is void if such person is

[1] As instances of Common Law rules, whose classification may give rise to interesting questions, the rule against contracts in restraint of trade and against contracts imposing penalties may be mentioned.

[2] There are, of course, cases where this is not so and where the statute contains expressly or by necessary implication the necessary information as to its application in cases where "international elements" are involved, such as, for instance, Section 72 of the Bills of Exchange Act, 1882, the Wills Act, 1861, the Foreign Marriage Act, 1892, and the Royal Marriage Act, 1772. Where this is so, an English court only has to apply the provisions of the statute, and any classification on its part is unnecessary, and the only question which arises is whether the statutory rule embodied in the Act should be considered to form part of the general rules of English Private International Law and thus afford assistance in other questions of classification, or whether the provision should be considered merely as a special statutory exception affording no assistance in elucidating general principles. The Royal Marriage Act and the Foreign Marriage Act seem to me to be clearly statutory exceptions, whereas Section 72 of the Bills of Exchange Act is a piece of codified Private International Law, and the Wills Act falls partly into one category and partly into another.

under sixteen. If this is the meaning of it, the Act lays down a rule of status and capacity and applies to the marriages of such persons wherever contracted, but does not apply, even in respect of marriages celebrated in the United Kingdom, if the personal law of neither of the parties is English, Scotch, or Northern Irish.

(iii) The Act may be intended to apply both to all marriages celebrated in the United Kingdom and to the marriages abroad of persons domiciled in the United Kingdom. In this case its character is both that of a territorial law and a personal law. So far as I know, there has been no decision on the application of this particular Act, and if a case arises which renders it necessary for an English court to determine the character of the rule laid down in the Act, the court will be classifying a rule of its own internal law. In approaching the question of classification, the court must ascertain as best it can the object of the legislature in passing this Act, and in doing so it will, of course, be influenced by the character which has already been given to other analogous Acts of Parliament. In the particular case, I think it extremely probable that an English court will hold the Act of 1929 to possess a personal character because this is the manner in which the English Acts rendering void *inter alia* marriages between persons within certain degrees of consanguinity and affinity have been applied.[1] I think it is very possible that this Act will be held to apply also to all marriages in the United Kingdom and therefore to possess a territorial character as well, and that the statutory prohibitions against marriages within the prohibited degrees would also be so interpreted, the basis of this view being that these marriages are considered undesirable by the legislature and therefore are not permitted to be performed whenever British law can prevent them. In most cases the court will simply be applying to the rules—statutory or Common Law—of its internal law, in order to determine their application, its ordinary principles of Private International Law which, as I have said before, can in this connexion only be interpreted in the light of general jurisprudence. An obvious instance is the rules in the Administration of Estates Act, 1925, for the devolution of property on intestacy. No court would have any hesitation in classifying them under the heading of succession on death and applying them only to estates which, according to English Private International Law, are governed by English internal law.

[1] See *Brook* v. *Brook*, 9 H.L.C. 193, where the Statute 5 & 6 William IV, cap. 54, was held to have a personal character.

14. I now wish to discuss two instances of the classification by the English courts of English statutes which have given rise to much discussion, namely those decisions, which have held that the Statute of Limitations and Section 4 of the Statute of Frauds were both provisions relating to procedure, with the result that, under the general Private International Law principle that procedure is governed by the *lex fori*, the provisions of these Acts must be applied by the English courts in every case that comes before them, irrespective of where the cause of action arose and the law by which it is governed. Before considering these cases in greater detail it may be convenient to consider the *raison d'être* of the rule that procedure is governed by the *lex fori*. Its basis is an obvious practical necessity. In each country courts are organized in the manner found appropriate by the *lex fori*, which determines which courts have jurisdiction in different classes of cases, the method in which proceedings must be instituted and the pleadings, written and oral, conducted, the manner and the stage at which evidence must be given and judgment delivered, and the means by which the judgments can be executed. In all these matters it is obvious that an English court cannot be expected at one time to apply French and at another Japanese procedure, and it is impossible for any law other than the *lex fori* to apply. There is absolute unanimity in the systems of all countries that all these matters are governed by the *lex fori*. These considerations, however, do not apply to a rule of the *lex fori* that in one class of case no action may be brought after the lapse of x years, and in another class of case after the lapse of y years unless certain conditions are fulfilled. There is no difficulty in an English court entertaining a foreign action after the lapse of six years although none of the conditions provided in the Statute of Limitations, which prevent the running of the period, are fulfilled. Similarly, if there is a rule of the law of the forum to the effect that in certain types of contracts no action shall be brought unless there is a memorandum in writing or certain other conditions fulfilled, whereas in other types of contracts the contract may be proved by oral evidence or in some other way, there is no practical necessity obliging the court to apply this rule in the case of a foreign contract, since it is not a general rule about the manner in which evidence should be given, but merely a special rule applicable to certain transactions. Neither of these cases, therefore, is covered by the grounds which are the basis of the rule, and it is well known that both these English decisions have been much criticized, and in both cases the English courts,

in attributing to their rules the character of procedure, have adopted a position different from that adopted by all, or nearly all, continental courts in classifying analogous rules of their own internal law. This divergence, of course, does not alone prove that either the English courts or the foreign courts are wrong, for the rules of internal law, thus divergently classified, *might* in fact possess an entirely different character. In order, therefore, to determine whether these decisions of the English courts are in principle right or wrong, it is necessary to consider the actual nature of the rules contained in these two statutes and the grounds upon which these decisions are based.

15. It is true that both statutes use the language of procedure: "No action shall be brought", &c., but this alone is by no means conclusive. Continental courts have found it necessary, in classifying rules as substance or procedure, entirely to disregard the place in which these rules are to be found in their codes. French courts have found it necessary to classify several provisions of their Code of Procedure as substance, and some provisions of the Civil Code as procedure. It is the real nature of the rule and not the words, or its place in the Code which is relevant. It is also true that neither Section 4 of the Statute of Frauds nor the Statute of Limitations has been held completely to extinguish the right. A statute-barred debt or claim to property may in certain circumstances afford a valid defence to an act which would otherwise create a liability; though it would not appear that a statute-barred claim for unliquidated damages for breach of contract, or for negligence, is really in any different position from a claim which is completely extinguished. Similarly, a contract, which comes within Section 4 of the Statute of Frauds or Section 4 of the Sale of Goods Act, may afford a perfectly good defence in cases where it could not be sued upon. Still, it cannot be denied that the position of a person who has rights which he cannot enforce by action, is entirely different from that of a person who can do so, and the nature of his rights is certainly changed. The maxim *ubi remedium, ibi jus* is so true, particularly in English law where the substantive law has in a great measure been created by the grant of remedies, that one would naturally hesitate to characterize as merely procedure, a rule which barred the remedy.

16. To take, first of all, the cases on the Statute of Limitations. The two early, but perhaps not quite conclusive, decisions of *Williams* v. *Jones* in 1811[1] and the *British Linen Company* v.

[1] 13 East 439.

Drummond in 1830[1] both proceed on the application of two principles of the jurist Huber: (*a*) his distinction between provisions relating *ad valorem contractus* and those relating *ad tempus et modum actionis instituendae*, and (*b*) *Praescriptio et executio non pertinent ad valorem contractus sed ad tempus et modum actionis instituendae.* In 1835 comes the decision in *Huber* v. *Steiner*.[2] In this case the English court was classifying a rule of prescription of the French Civil Code, and I shall refer to it later in connexion with the classification of the rules of a foreign law. The importance of the case for the present purpose is, however, that it is here that Tindal C.J. adopted the test, first formulated by Story, which has been applied by the English courts consistently for the purpose of the classification of rules of prescription and limitation, namely the test whether the rule extinguished the right or only barred the remedy—a test which is a slight qualification to Huber's rule. In 1837 the House of Lords on appeal from Scotland, in the case of *Donn* v. *Lippman*,[3] reversing the decision of the Court of Session, applied the Scotch Statute of Limitations to the case of a bill of exchange, drawn, accepted, and payable in France. This case not only firmly establishes the English classification of Statutes of Limitation and Story's test, based on the distinction between extinguishing the right and barring the remedy, but also decides that though under the Statute the period of limitation ceases to run if an action is brought, the bringing of an action in a foreign court does not count for this purpose. It is here that Lord Brougham said:

"The parties should take the law as they find it when they come to enforce the contract.... The argument that the limitation is of the nature of the contract supposes that the parties look only to the breach of the agreement. Nothing is more contrary to good faith than such a suggestion."[4]

17. For reasons which I have briefly indicated above, I think that the distinction between the barring of the remedy and the

[1] 10 B. & C. 903. [2] 2 Bing N.C. 202. [3] 5 Cl. & Finn 1.

[4] In 1869, *Harris* v. *Quine* (L.R. 4 Q.B. 653), the plaintiff brought an action for a debt arising out of a contract made in the Isle of Man; he had previously brought an action in the Isle of Man courts and judgment was given against him because three years had elapsed which is the period of limitation under Manx law. He then brought proceedings in England before a period of six years had elapsed and obtained judgment because the suit was not barred by the English Statute of Limitations, and the Manx Limitation Act was procedure and the judgment of the Manx court was not one given on the merits. Cockburn C.J. stated that if the matter were *res integra* he would have taken a different view. I refrain from discussing the exception suggested on the authority of *Pitt* v. *Lord Dacre* that in the matter of actions relating to land limitations are governed by the *lex situs* and not by the *lex fori*.

extinction of the right which has been adopted by the English courts for the purposes of classification is, though superficially attractive, in reality false. The high-sounding words of Lord Brougham in the last sentence of the passage quoted above seem to me to be completely divorced from reality. Persons entering into contracts certainly consider the possibility of disputes arising out of them and of the necessity of having recourse to process for the purpose of enforcing their rights. If this were not so, how are all the arbitration clauses so commonly inserted in commercial contracts to be explained, or those clauses, frequently inserted in contracts between British and foreign firms, providing that the dispute shall be determined in accordance with English law? Further comment on the proper classification of statutes of limitation is, however, better reserved until after the consideration of the classification of foreign statutes of limitation in section (*c*) below.

18. Let us now consider the decisions on the Statute of Frauds and the case of *Leroux* v. *Brown*[1] of 1852 which arose out of an agreement made in France between the plaintiff and the defendant, under which the plaintiff was to enter into the defendant's service for a period of one year certain at a salary. This agreement was one not to be performed within the space of a year and there was no memorandum to satisfy Section 4, but in France, where the contract was made, the agreement was enforceable on purely oral evidence. It was held that the plaintiff could not bring an action against the defendant in England on account of Section 4 of the Statute of Frauds. It was argued for the plaintiff that the formalities required for the validity of a contract must be determined in accordance with the *lex loci contractus* and, if the contract was good by that law, it was good from the point of view of form everywhere and a large number of authorities were cited, from Boullenois and Huber down to Burge and Story. It was then argued on the other side that Section 4 in no way made the contract void, but merely said no action should be brought on it, and Jarvis C.J. in his judgment says:

"There is no dispute as to the principles which ought to govern our decision; my brother Allen admits that if the Statute applies not to the validity of the contract, but only to procedure, the plaintiff cannot maintain his action. . . . On the other hand, it is not denied by Mr. Honeyman that if the fourth Section applies to the contract itself, or, as Boullenois expresses it, to the solemnities of the contract, then inasmuch as our law cannot regulate foreign contracts

[1] 12 C.B. 801.

a contract like this may be enforced here. I am of the opinion that the fourth Section applies not to the solemnities of the contract but to procedure."

The result of this decision is that a party, who had concluded a contract in France and done everything required by that law to render it valid and enforceable, found that he could not enforce his rights in England under it. He would hardly be likely to approve of the view that his substantive rights were unaffected, when in fact they were rendered completely useless to him.[1]

19. It is interesting to contrast *Leroux* v. *Brown* with a converse case decided by the French Cour de Cassation in 1880.[2] B., an English merchant and H., a Frenchman, made a contract of sale in London. Delivery or part delivery was made and B. claimed 1,000 francs under the contract and contended that he was entitled to prove the contract by the evidence of witnesses, on the ground that this would have been the case under the law of England where the contract was made. H. contended that Article 1341 of the French Civil Code ["Il doit être passé acte devant notaires ou sous signature privée, de toutes choses excédant la somme ou valeur de 500 francs"] applied, and that this provision was one directed against multiplicity of process and applied to all actions brought in France. The Cour de Cassation overruled the courts below, and held that Article 1341 only applied to contracts concluded in France and that contracts were governed both as to their form *and mode of proof* by the *lex loci contractus*, and therefore the English merchant won his case. Now Article 1341 of the French Civil Code, like Section 4 of the Statute of Frauds, refers in terms to evidence and does not render completely void a contract not concluded in the form laid down. It seems to me that the two provisions are so similar in character that it is impossible to hold that it can be correct to classify them differently, and I am bound to admit that I prefer the view of the French Cour de Cassation. I find some support for this view in the observations on *Leroux's* case made by a particularly eminent judge, Willes J. in *Williams* v. *Wheeler*[3] only a few years later:

"I should require much argument to satisfy me that a contract made in

[1] It might perhaps have been argued that the Statute of Frauds was based upon general rules of public policy, namely the prevention of the English courts being burdened with unfounded actions supported on untrue evidence, and that, therefore, it applied to suits wherever the cause of action arose. This, however, was not the ground of the decision, but I think that this argument does support the application of Section 18 of the Gaming Act, 1845, and of the Gaming Act, 1892, which prevent the bringing of actions for the recovery of sums won by wagers and gaming, to all such actions wherever the gaming or wagering took place.

[2] *Benton* v. *Horeau, Clunet*, 1880, p. 480.

[3] 8 C.B. (N.S.) 299.

France without writing, which is valid by French law, is incapable of being enforced in an English court, by reason of the requirements of the English law as to the formalities of contracts made in England. The general rule is *locus regit actum* and though I fully recognize the ground upon which the judgment in *Leroux* v. *Brown* professes to be founded, viz. that procedure is governed by the *lex fori*, I am not satisfied that either of the sections of the Statute of Frauds to which reference has been made warrants the decision."

French jurisprudence has made a distinction between the different provisions relating to evidence, which is, I think, a correct one. It contrasts provisions relating to the manner in which particular matters must be proved (e.g. such as Article 1341, and Section 4 of the Statute of Frauds), called "règles relatives à la constitution de la preuve", with provisions relating to the manner, time, &c., in which the evidence is to be produced before the court (administration de la preuve) which are classified as procedure.[1]

20. It appears to me that the English courts have given too wide an interpretation to the conception of procedure for the purposes of the rule of Private International Law, by adopting an unreal distinction between the right and the remedy. But they have not been consistent in doing so. For in contract cases (and, I think, in tort also) the measure of damages is determined by the law which governs the contract and is not regarded as procedure.[2, 3, 4]

[1] See Silz, *l.c.* (p. 51, n. 4, *supra*), pp. 169–71 and cases cited note (1), pp. 169, 356–7.

[2] See Foote, 5th ed., p. 524, and cases there cited.

[3] The rule *actio personalis moritur cum persona*, which prevents claims in tort being brought on behalf of or against the estates of deceased persons, seems to be regarded as procedure (see p. 62, n. 2 above, *Batthyany* v. *Walford*) but the courts construed the limitation of liability under the Merchant Shipping Act of 1854 in respect of damages arising out of collisions as being a provision of substance, not procedure. The Act of 1862 expressly made the limitation applicable in all cases whatever the flag of the ship, and left the courts no occasion to classify it.

[4] The English Bills of Exchange Act, Section 3, defines a bill of exchange as an unconditional order in writing addressed, &c., and further provides that an instrument which does not comply with these conditions is not a bill of exchange. Section 72 contains the provisions of the Act with regard to the conflict of laws where a bill is drawn in one country and negotiated, &c., in another, and provides *inter alia* that the validity of a bill as regards requisites of form is determined by the law of the place of issue and that the interpretation of the obligations of the drawer, endorser, acceptor, &c., are governed by the law of the place where the drawing, endorsement or acceptance takes place. If a question, therefore, arises as to whether a document, which contains something which may or may not be a condition, is a bill of exchange, it would seem in principle that this question must be determined before it can be said that the Bills of Exchange Act (including Section 72) applies to it at all, and that this question must be decided on the basis of the definition given in Section 3. Where such a bill is drawn in one country and accepted in another, it would seem that recourse must be had either to the law of the place of drawing or of the place of acceptance to determine whether this

(*c*) *Classification of Rules of Foreign Law.*

21. In order to classify a rule or institution of foreign law it is, I suggest, essential that the court should not merely ascertain the purport of this rule as a rule of internal law, but also that it should ascertain in what circumstances it is applied by the courts of the country of whose legal system it forms part, i.e. whether it is applied as a personal law, as purely local or territorial law, as a rule of procedure or as a rule of public policy. It is only when in possession of this information that a court is in a position to classify the foreign rule or institution. On the basis of this information, the court should classify it according to the conceptions of analytical jurisprudence, a branch of legal science which is in essence purely general and theoretical, and not national. On the other hand, it is certainly true that an English court, being bound under the English system of precedents to follow previous decisions of courts of superior or equal authority, must accept propositions of analytical jurisprudence which have been adopted as general principles in previous cases, whether those principles are theoretically right or wrong, such as the test, for distinguishing procedure from substantive law, whether the right is extinguished or the remedy barred (para. 14 *et seq.* above). The extent to which the manner in which rules and institutions of the internal law of the forum have been classified affords a proper basis for the classifications of foreign institutions depends (*a*) on the existence of a more or less exact correspondence between them, and (*b*) on the classification of the internal rule having been reached on general principles and not in consequence of an express (and perhaps exceptional) direction of the legislature on other grounds peculiar to the country concerned.

22. In classifying a rule of foreign law it may be found that this rule has been classified by the courts of the country of whose system it forms part. By this I mean that those courts, being left free to determine the matter, have given a decision which purports to be arrived at upon general scientific grounds. If this is the case

provision is or is not a condition so as to prevent the document being regarded as a bill of exchange. Which of these two laws it should be it seems difficult to say. In the case of the *Guarantee Trust Company* v. *Hannay*, [1919] 2 K.B. 623, this question arose, and two of the four judges who delivered judgment in the case expressed the opinion (though it was not necessary for the decision) that this was a question of form to be decided by the law of the place of issue in accordance with Section 72; but *quaere* whether this is a question of form, and whether Section 72 applied unless the document had already been held to be a bill of exchange.

an English court, in classifying this rule, should, and I think would, attach great weight to the foreign classification of its own rule, but I do not think that it is bound by it if it finds it to be contrary to the general principles.[1] The judgment of the Privy Council in *Huntington* v. *Attrill*[2] is an admirable instance of this. A statutory provision in the law of the State of New York made officers of a corporation liable for the debts of the corporation if they signed reports with regard to the corporation which they knew to be false. If this was a penal provision it would not create a liability which could be recognized in England or Canada; but if it were regarded as creating a civil liability, an action could be brought on it in these countries. There were decisions of courts of Maryland[3] to the effect that it was a penal provision and also decisions of New York courts holding very similar provisions penal. An action on this New York Statute was brought in Canada against an officer of a corporation, and the Privy Council held that the

[1] But, in fact, as I have already indicated, in many cases a court does not have to classify on scientific grounds the rules of its own law, because it finds that their application is determined clearly by express legislative provisions, which it simply has to follow without considering their compatibility with general principles. To take an instance which is one of the favourites in the discussion of this subject by continental writers. Article 992 of the Netherlands Civil Code provides (*a*) that no wills made in Holland are valid unless made "dans la forme authentique" (i.e. before a notary or public authority), and (*b*) that Dutch nationals cannot make valid wills abroad except in this form. If a Dutch national makes a will in Germany in the holograph form, a Dutch court will merely have to apply the Article and hold the will invalid, whether or not the holograph form is recognized in Germany as a proper form for making wills. Further, the Dutch court will not have to consider whether this second provision (*b*) is a rule relating to capacity or form, or whether that rule is or is not in accordance with the ordinary principles of Private International Law. In Germany, the rules of Private International Law on the subject are (*a*) that the capacity to make a will and the amount of property which may be disposed of by a will are governed by the personal law, and (*b*) that the form of wills is governed by the *lex actus*, whatever the personal law of the testator may be; and on these grounds the German courts have, in fact, held a holograph will made in Germany by a Dutch national to be a valid will, and there is thus a conflict between the Dutch and German courts (see Prof. Frankenstein, "Tendances nouvelles de droit international privé", *Recueil de l'académie de droit international*, 1930, Vol. III, pp. 247–348). The conflict, however, seems to me to arise not out of a difference of classification, but out of the application in the two countries concerned of different rules of Private International Law; Dutch law (at any rate so far as the wills of Dutch nationals are concerned) subjecting to the personal law not merely the capacity of the testator but also the form of the will, and German law subjecting the form to the *lex actus*. If in fact (though I do not think it is the case) the Dutch courts had gone farther and declared paragraph (*b*) of Article 992 to be a rule relating to status and capacity, I think the German courts would be perfectly entitled to reject the Dutch classification, because, as it seems to me, the rule clearly is not one relating to capacity but does relate to form, and in this case there would be a conflict of classifications. (Cp. on this point Pillet and Niboyet, *l.c.*, p. 439, and p. 54, n. 1, *supra*.)

[2] [1893] A.C. 150.

[3] 70 Maryland Rep. 191.

liability was civil not penal, and that the action would lie. The judgment says:

"Their Lordships cannot assent to the proposition that, in considering whether the present action was penal in such sense as to oust their jurisdiction, the courts of Ontario were bound to pay absolute deference to any interpretation which might have been put on the Statute in the State of New York. They had to construe and apply an international rule which is a matter of law entirely within the cognizance of the foreign court whose jurisdiction is invoked."

But it is to be noticed that the Privy Council decided the matter on the application of general theoretical principles and sought for no analogies to the New York provision in the internal law of Canada or of the United Kingdom.

23. It is well known that the laws of some countries impose upon certain classes of individuals restrictions on their power to enter into transactions which other people can conclude (for instance, the restriction on the power of monks and nuns to marry, recognized by the law of countries where Roman Catholic or Orthodox religious law is applied; the restrictions which a person who has been declared a prodigal is under in accordance with French law, and various *quasi* penal restrictions created by the law of other countries), and that these restrictions are considered by the courts of these countries to be of a personal character, so that they operate in relation to transactions entered into abroad; but, as is also well known, in relation to transactions abroad, these restrictions are frequently not recognized by the courts of other countries, and it is often said that this conflict arises out of a conflict of classification, because the countries which impose them classify them as matters of status and capacity, and other countries, which do not recognize them, do not consider them to be such. I think, however, that the true explanation of the conflict is different. It will be difficult, I think, to deny that the restrictions on a monk or nun or a prodigal are matters of capacity, but the true explanation of their non-recognition is that considerations of public policy operate to prevent the recognition of types of incapacity created by foreign law which are unknown in, and even repugnant to the ideas of, the judicial system of the forum.[1]

24. In classifying rules and institutions of foreign law, full application should be given to M. Bartin's second principle that,

[1] It is perfectly true that in the case of *In re Selot's Trust* ([1902] 1 Ch. 488) the English court, in refusing to recognize the restrictions on a French prodigal, did say that the restrictions were not in the nature of status, but this is a case, I think, where the wrong reason is given for a decision possibly otherwise correct. Pillet and Niboyet, *l.c.*, p. 378, also regard these cases as conflicts of classification, but I think wrongly.

once it is ascertained that a given foreign law applies, it must be applied *in toto* with all its relevant subsidiary classifications, and I have already pointed out the greatly increased scope of this second principle in avoiding conflicts of classification in cases where the renvoi or analogous principles are applied.[1]

25. It may be useful to consider one or two concrete cases of classification of foreign laws, and, since the question of prescription and limitation has already been considered, it is convenient to deal with the English decisions on foreign limitations. In 1835, in the case of *Huber* v. *Steiner*,[2] a case of an action on a French promissory note, the English courts had to decide whether to apply a provision of the French Commercial Code (Article 189) reading: "Toute action relative à lettres de change s'est prescrite par cinq ans", and held that this rule was a rule of procedure only and consequently not one which the English courts should apply, although the contract was governed by French law. Tindal C.J. arrived at this conclusion on the application of the test of the barring of the remedy and the extinction of the right, and on a careful examination of the effect of the French rule as interpreted in France in the light of this test. There is, however, no doubt, I think, that this French rule is not regarded by the Freneh courts as a rule of procedure, but that is not because the article extinguishes the right, but because the French courts do not adopt this test. Similarly, in a recent and quite interesting case, the *Société etc. de Prayon* v. *Koppel*,[3] another bill of exchange case, where the bill was payable in Germany, the defence was based on a provision of German law to the effect that claims against an endorser were barred if not brought within three months of the protest of the bill.

Evidence of German law was given and, according to the report of the case, the German experts were agreed that the German law of prescription was regarded in Germany as part of substantive law and not of procedure. But Roche J. reached the conclusion (on the evidence of German law) that this rule only barred the

[1] Though, as I have already stated, I do not think it is possible to adopt the view that a court is bound to accept the classification given by a foreign court to a rule of its own internal law where this classification appears clearly to be contrary to general principles, there is, I think, at least one class of case where it should do so, namely where, for instance, an English court finds that a matter must be governed either by French or German law according to the manner in which the classification question is decided, and French and German law are agreed in adopting a given classification. (See para. 12 above.)

[2] 2 Bing: N.C. 202: a case already referred to. (See para. 16 above.)

[3] *The Times*, November 2, 1933.

remedy against the endorser and did not extinguish the right, and therefore he held it to be a rule of procedure and, as such, not applicable in the English courts. He said: "Foreign courts might have decided that their laws of limitations were part of substantive law but he was unable to regard them as such." There is no doubt that this classification involves a conflict of classification with German law and, if the English distinction between extinguishing rights and barring remedies was put to the experts in German law, they must, I think, have been asked a question which it was very difficult for them to answer, since German law does not adopt this distinction at all. Roche J. had, no doubt, in view of the authority of previous cases binding upon him, no option but to apply this test, and to my mind this case is another indication of the unsatisfactory nature of this rule which at the moment forms part of English Private International Law, my opinion on this point being supported by the more weighty words of Cockburn C.J. in *Harris* v. *Quine*.[1] I should consider this principle eminently suitable for consideration by the committee which has recently been set up by the Lord Chancellor to consider certain doctrines of English Common Law which may be regarded as obsolete or unsatisfactory. It is constantly leading to conflicts of classification between English and foreign courts.[2]

26. Before leaving the question of limitations there is one striking case decided by the German Reichsgericht in 1882 which deserves notice.[3] An action was brought in Germany on a contract governed by United States law at a date after the relevant periods of limitation both of German and of United States law had expired.

The German Supreme Court held that it could not apply the German periods of prescription because they were rules of substance and only applied to contracts governed by German law. On the other hand, the United States rules of limitation had been

[1] See p. 68, n. 4, *supra*.

[2] Further instances which may be quoted are the English decisions as to the character of various Soviet decrees, which have been interpreted by the English courts as affecting the remedy and not the rights, when one feels morally certain that in Soviet Russia these rules were considered as doing both these things. One instance amongst many which may be cited is the *First Russian Insurance Company* v. *the London and Lancashire Insurance Company*, [1928] Ch. 922, where Romer J. classifies as procedure a Soviet Decree of January 1, 1923, which, in introducing the new Civil Code of the Soviet Republic, declares that claims based upon rights arising prior to November 1917 should not be entertained.

[3] This case is quoted by Frankenstein, *l.c.* It is reported in *Entscheidungen des Reichsgerichts*, Vol. VII, p. 21.

declared by the United States courts to be rules of procedure and the German court thought that it must accept the classification of a United States law adopted in the United States courts,[1] and therefore these, being rules of procedure, would not be applicable in a German court. Consequently the German Supreme Court held that in the circumstances there were no rules of prescription or limitation applicable to the case and therefore the plaintiff must succeed. This decision is entirely logical, but clearly unsatisfactory, and one is tempted to consider in what respect it should be regarded as being wrong. I think myself that the German court should not have considered itself bound to accept the classification of these American statutes of limitation adopted in the United States, but should have treated them as rules of substance and therefore applied them.[2] But, it may be objected, is not this falling into the cardinal error of applying United States law in a case where, according to the United States courts, that law does not apply, and therefore, in the guise of applying United States law, applying something which is really the law of no country at all? The answer is that, if the case had come before the United States courts, admittedly they would have applied these provisions. Consequently their application in Germany would lead to no conflict, and this would not really have been a case of the German courts applying United States law in a case where the United States courts, if it had come before them, would not have applied it.

27. I will conclude by discussing those cases where the English courts have dealt with the consents to marriage necessary under French law—decisions which have provoked so much criticism and discussion. Before doing so, I should like to recall what I have said above, to the effect that the rules of English law with regard to consents for the purposes of marriage are properly classified as part of the formalities of the marriage, and I must complete this by recalling that, before these decisions were given, an Irish Statute which, unlike the English rules, did make a marriage of a minor concluded without the necessary consents absolutely void, had already been held in *Steele* v. *Braddell*[3] to apply to all marriages in Ireland and not to apply to marriages elsewhere of persons domiciled in Ireland. It is then desirable to point out that English Private International Law with respect to marriages is not, I think, as usually stated, to the effect that the marriage must be valid

[1] For a case on the English Statute of Limitations see *Zivilsachen*, Vol. XXIV, p. 383.
[2] Cp. the Privy Council in *Huntington* v. *Attrill*. *Supra* para. 22.
[3] 1838, Milw., Eccl. Rep. Ir. 1.

according to the *lex loci contractus* from the point of view of form, but that it must be valid by the *lex loci contractus* whatever the nature of the requirements of that local law may be.

28. It may then be useful to consider what are in fact the rules of the French Civil Code with regard to consents for the purposes of marriage—there are four different provisions:

(*a*) Article 144 states that a male under 18 years and a female under 15 years cannot contract a marriage.

(*b*) Article 148 provides that a son who has not reached the age of 25 and daughter who has not reached the age of 21 cannot contract marriage without the consent of their parents. (Since 1907 the age for men has been reduced to 21.)

(*c*) Article 151 provides that persons over the age specified in Article 148, but under 30, must demand the consent of their parents before marriage, and, if this consent is not given, must make a formal notification of the intended marriage and may then, after the lapse of 30 days, marry even if this consent is not given.

(*d*) Under Article 170 any French person, of whatever age, marrying abroad must give notice of his marriage to the appropriate Office Officiel de l'État Civil in France, and it is this which makes it clear that Articles 144, 148, and 151 apply to the marriages abroad of French citizens. Failure to observe any of these provisions except (*a*) does not automatically involve the nullity of the marriage, but will do so if within a certain period of time proceedings are instituted to this effect before the competent court; except that in the last case, Article 170, it by no means follows necessarily that the court will annul the marriage.[1]

29. It will be seen that these four classes of cases differ considerably, but they are all expressly made personal by the French Code. There is much to be said for the view that effect ought to be given by foreign courts to all these provisions in regard to marriages celebrated outside France, as being matters of family law, and that even provisions relating to formalities, which are enacted to safeguard family interests by the personal law, should be respected elsewhere, marriage being essentially a family matter. Personally, I think that that is the right view, but the English courts never got farther, in recognizing the extraterritorial operation of the personal law in matters of marriage, than allowing its operation as regards what is sometimes called "capacity" and

[1] See the *Saverguat* case: *Clunet*, 1898, p. 138. As to the consents necessary under German law and the similar effect of failure to obtain them—see *Entscheidungen des Reichsgerichts*, Vol. XLII, p. 336.

sometimes the "essentials of marriage". The explanation of this major difference of classification is partly historical and partly the nature of the provisions of English internal marriage law. The English decisions on the consents of French law for marriage may, I think, justifiably be cited as instances where in fact, if not in form, the internal law of the forum *has* influenced the classification of foreign rules. In order, however, to understand those cases, it is necessary to appreciate that "capacity" and "essentials" were the tests which were being applied in classifying the foreign rules into two categories, (*a*) those which were matters of "capacity" or "essentials" and which might be regarded as having extra-territorial application, and (*b*) the rest, which were deemed to be only suitable for recognition in relation to local marriages and were classified under the heading of form. Difficult minor questions of classification, however, arose on the application of these tests, i.e. whether a rule could be said to be one affecting "capacity" or "essentials" or not. Foreign rules restricting marriages between persons, on the ground of consanguinity or affinity, were readily admitted as falling within this category,[1] and the rules relating to consents were not. These results were no doubt partly due to the facts (*a*) that the English rules as to consents had been long held to be only of local operation[2] and, owing to their nature, could not be held to be "capacity" or "essentials", and (*b*) that the English prohibited degrees had more recently been held[3] to possess a personal character: but this is not the full explanation. One must look again at the French rules relating to the marriages of French persons abroad. I do not think that it would be open to dispute that (*a*) Article 144, which renders persons under eighteen and fifteen incapable of marriage, is a matter of capacity. The English courts do not appear to have had occasion to pronounce on it. Equally clearly I think (*d*), Article 170, which merely requires notices to be given in France, *is* a matter of form, and the conflict between English and French law arising out of this rule arises on the major not the minor question of classification. The two doubtful cases, therefore, are (*b*) Article 148, and (*c*) Article 151. There is no doubt that the requirements of (*c*), Article 151, have been held to be matters of form and not capacity by the English courts. This was decided, I think, not in the actual decision in *Simonin* v. *Mallac*[4]

[1] *Sottomeyer* v. *de Barros*, No. 1 and No. 2, 3 P.D. (C.A.) 1, 5 P.D. 94.

[2] (1789) *Compton* v. *Bearcroft*, 2 Hagg. Cons. 430.

[3] *Brook* v. *Brook*, 9 H.L.C. 193; *Mette* v. *Mette*, 1 Sw. & Tr. 416.

[4] 2 Sw. and Tr. 67. The court had to pronounce on the effect of non-observance of Article 151 in connexion with a marriage in England of two domiciled French persons,

—the ground of which is at any rate doubtful—but by the manner in which that decision has been explained and distinguished in later cases, namely *Brook* v. *Brook* and *Sottomeyer* v. *de Barros*.[1] Still it is true that the court which decided *Simonin*'s case in 1860 pointed out that the requirements of Article 151 could not be held to be matters of capacity because the person desiring to marry could, by completing certain formalities, dispense with parental consent, and also observed that this was not the case with regard to persons coming under Article 148. It is therefore more justifiable to regard Article 151 as form than Article 148. The requirements of (*b*) (Article 148) did not come before the English courts till 1907 in *Ogden* v. *Ogden*[2] where the court was dealing with a marriage which had been celebrated in England between a domiciled Frenchman aged 19 and a domiciled Englishwoman, parental consent not having been obtained. Under Article 148 there is no means by which the necessity of parental consent can be got over. Nevertheless the English courts upheld the marriage, although it had previously been annulled by the French courts, but the actual ground of the decision was not that the consents under Article 148 were matters of form, but that, even if they were capacity, this was an incapacity of a kind not recognized in English law and attaching to one party only, and therefore the case was within the exception indicated in *Sottomeyer* v. *de Barros* (No. 1) and applied in *Sottomeyer* v. *de Barros* (No. 2).[3] There are, however, passages in the judgment in which it is made clear that the court would not attach any importance to the difference of the nature of the rules under Articles 148 and 151 respectively, and would regard any kind of requirement of a foreign law for parental consents as being governed by the *lex loci contractus* and therefore presumably as being a matter of form. These observations are, however, not essential to the decision and are therefore not binding in any other case, but the view they took does derive support from a passage in the judgments in *Brook* v. *Brook* (*l.c.*, p. 216) where Lord Campbell explains the meaning of "essentials" of a marriage as those conditions which cannot be surmounted by *any* person's consent, placing every other requirement in the category of form. The view that *all* requirements as to consents for marriage, including those under Article 148, are matters of form is in the opinion of almost

aged 29 and 22 years respectively, the marriage having already been annulled by the French courts.

[1] See p. 79, nn. 1 and 3, *supra*.

[2] [1907] P. 107; [1908] P. (C.A.) 46.

[3] 3 P.D. 1; 5 P.D. 94.

every writer a wrong view, even on the application of "capacity" as the proper test. However this may be, since the decision of the House of Lords in *Salveson*'s[1] case and certain other decisions, *Ogden* v. *Ogden* has been subjected to so much criticism that it is doubtful whether it now possesses any authority whatever, and it is satisfactory to conclude the story by indicating that *Salveson*'s case and other quite recent decisions, relating to the recognition of decrees of the personal forum in matters of nullity of marriage, would appear to have extricated English law from the conflict and difficulties into which *Simonin* v. *Mallac* and, more particularly, *Ogden* v. *Ogden* had landed it. Recently in *de Massa* v. *de Massa*[2] an English court recognized a decree of nullity granted by a French court in circumstances exactly similar to the case where recognition was refused to such a decree in the *Ogden* case.

III. *Conclusion*

30. It is obviously impossible, however, within the limits even of an excessively long article to examine a sufficient number of concrete cases in a matter which extends over the whole field of Private International Law. It is, therefore, impossible to do more than indicate the nature of the problem and submit a certain number of observations upon it, and to deal with a very few concrete cases. In spite of the fairly extensive continental literature, English law and English lawyers seem to have been almost unaware of this important and fundamental problem of Private International Law.[3] The object of this article will be more than fulfilled if it succeeds in arousing any interest in the problem and a fuller and more adequate treatment of the matter by more competent persons.

[1] [1927] A.C. 641. (See *British Year Book*, 1928, pp. 126, 169, 181; and 1932, p. 167, and cases there referred to.)

[2] *The Times*, March 31, 1931.

[3] In the United States the subject has been dealt with by Dr. Lorenzen in the article referred to on p. 46, n. 3 above. In Dicey's *Conflict of Laws* it is referred to in a single paragraph where the instances quoted relate—almost exclusively—to that class of cases where it is not necessary to classify a rule of law but only to apply a Private International Law conception to the facts. (See 5th ed., p. 44, and para. 12 above.)

PRESCRIPTION OF CLAIMS IN INTERNATIONAL LAW

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I

PRESCRIPTION is defined by Sir John Salmond as "the effect of lapse of time in creating and destroying rights".[1] It follows that the effect of prescription thus defined may be acquisitive or extinctive. It is only with its extinctive aspect that this article is concerned. Extinctive prescription may be further classified as perfect, where its effect is to destroy a right completely, or imperfect, where only a right of action is destroyed, leaving a right in existence, unenforceable, but capable, like an *obligatio naturalis*, of having other legal effects. This imperfect prescription is commonly called limitation of actions, though the operation of Statutes of Limitation is not necessarily imperfect.[2] Although in Conflict of Laws the distinction may be very relevant,[3] it is submitted that in international law there is no room for this division of extinctive prescription into two types. It is difficult to see what legal effect could be given to an international claim which continued to exist but could not be countenanced by any court or arbitral tribunal. For the purposes of this article therefore the distinction will be ignored.

It may be, however, that a better title for this article would have been "The effect of lapse of time in destroying international claims". For this is the subject it is intended to investigate, and it is not at all certain that all the topics which require consideration can legitimately be treated under the title of prescription. In English law, for instance, lapse of time may operate to defeat claims in two distinct ways. It may operate as a defence in itself, as where a Statute of Limitations or laches (in the narrow sense of the term) is pleaded. Or again, it may operate as part of a more general defence, such as release, election, waiver, or estoppel, where lapse of time is said to operate by way of acquiescence.[4] On the other hand, it is submitted that the term prescription may be properly used despite the absence in international law of definite time limits such as are usually found in municipal systems—

[1] *Jurisprudence*, 7th ed., p. 466.

[2] e.g. The Real Property Limitation Act 1833, s. 14.

[3] See the recent case of *Société Anonyme Métallurgique de Prayon* v. *Koppel*, discussed in *Law Journal*, Vol. LXXVI, Dec. 16, 1933, at p. 371.

[4] See Brunyate, *Limitation of Actions in Equity*, pp. 188–9.

though indeed the absence of such limits presents grave difficulties. The principle or principles underlying prescription take on a new function and importance. No longer are they merely the rational bases of an existing institution; they become the institution itself. Not only why, but also when, a time limit is to be imposed must now be indicated—and with reasonable precision.

In searching for the underlying principles of prescription (or for the effects of lapse of time in barring claims), it is proposed to investigate international practice as shown in treaties and the decisions of arbitral tribunals. The principles that emerge will, therefore, be reached inductively, and not deductively from the general notion of prescription. The Resolutions of the Institut de Droit International, passed at The Hague in 1925, declare that the limitation of actions for obligations between states should be included "among the general principles of law recognized by civilized nations, which international tribunals are called upon to apply".[1] In doing so arbitral tribunals will be entitled to argue, as they have done before, deductively from the general notion of prescription. It may be useful, however, to consider without preconceived notions how far positive international law has already gone in admitting the effect of lapse of time in barring claims.

II

In the preamble to the Resolutions of the Institut mentioned above it is declared premature to advise the adoption of a general convention on the subject,[2] but it is suggested that the general principles stated in their Resolutions for the guidance of international judges and arbitrators may usefully be supplemented, especially as regards periods and causes of suspension of prescription, by special agreements inserted in various types of treaties. Treaties of commerce or navigation, concerning literary, artistic, or industrial property, or generally of an economic, social, or financial nature are given as examples. The statement of Oppenheim[3] that it is clearly desirable "that the application of the principle should remain flexible and that no attempt should be made to establish fixed time limits" must be taken subject to the above qualification. There can be little doubt that the prin-

[1] See Appendix.

[2] It must be assumed that this was also the opinion of the Sub-Committee on Prescription appointed by the League Committee of Experts for the Progressive Codification of International Law. No report appears to have been published.

[3] *International Law*, 4th ed., at p. 297.

ciple of flexibility would be assisted if international judges, in applying different prescriptive periods to different cases, could be guided—as English courts of equity were in applying Statutes of Limitations by analogy—by what states in their treaty practice have found to be reasonable. In at least one case, *Sarropoulos* c. *Etat bulgare*,[1] the tribunal was guided by "certain treaties, concluded in regard to cases analogous to that before the Tribunal" which fixed a prescriptive period of 20 years. It has not been possible, however, to trace these treaties.

An exhaustive search in the *British and Foreign State Papers*, kindly undertaken by Mr. H. Ritchie, late of the Foreign Office, shows that treaty practice so far is not very helpful. No clear treaty provision has been found comparable to the stipulation in the British Guiana Arbitration Treaty[2] that adverse holding or prescription during a period of fifty years shall make a good title. Some points of interest may be made, however, with respect to different kinds of treaties.

I. *Treaties of Arbitration excluding the defence of Prescription.*

Such is the treaty of November 10, 1858,[3] between the U.S.A. and Chile, concerning the submission to arbitration of the Macedonian claims, which provides that the arbiter shall not consider the exception of prescription. The admissibility of the defence of prescription was at this time very much in dispute, and no later example of its exclusion has been found.

II. *Treaties of Arbitration which provide for the barrer of certain claims.*

Three distinct types of Barrer Clauses are found:

(*a*) Clauses which bar claims actually presented to and decided by a tribunal. Examples of these and of the two following classes are given in the American Agent's brief in the *Cayuga Indians* case.[4] They have nothing to do with prescription.

(*b*) Clauses, such as (*a*) above, which further bar all claims that might have been presented to a tribunal but were not so presented. In such a case the time-limits which have been agreed upon within which claims must be presented to the tribunal, usually six months or a year, operate as prescriptive periods. But

[1] Reported in *Annual Digest 1927–8*, Case No. 173.
[2] *Treaty Series*, 1897, No. 5, Article 4 (*a*).
[3] Moore, *International Arbitrations*, Vol. V, p. 4691.
[4] *American and British Claims Arbitral Tribunal, 1910. Nielsen's Report*, pp. 232–3.

this is a specially agreed penalty for delay and has nothing to do with the antiquity of the claim.

(*c*) Clauses, such as (*b*) above, which still further bar all other outstanding claims. In so far as such clauses bar claims which could not have been presented to a tribunal, this is release and not prescription. There is, however, one exception. If claims arising before a certain date are excluded from the competence of the tribunal and are yet barred by the general release, this is true prescription. Examples of this, however, are more apparent than real. The Claims Convention of 1853 between Great Britain and the U.S.A.[1] combines a barrer clause of all outstanding claims with the provision (Article II) that no claim arising out of any transaction of a date prior to December 24, 1814, shall be admissible. But, to quote Mr. Day, Secretary of State, in a letter to Mr. Grout, July 4, 1898:[2] "This provision merely recognized the principle, which has been repeatedly applied by this Government, that claims growing out of transactions that accrued during or prior to the war of 1812 were barred by the failure to revive and perpetuate them by the treaty of peace"—i.e. the Treaty of Ghent, signed on December 24, 1814. A similar explanation may be given to the clause (Article II) in the Convention between the U.S.A. and Mexico, of July 4, 1868,[3] providing that no claim shall be admissible arising out of any transaction of a date prior to February 2, 1848, the date of the Guadaloupe Hidalgo Treaty of Peace; and that this Convention of 1868 bars all outstanding claims will explain why a subsequent Convention between the same parties, of September 8, 1923,[4] also barring all outstanding claims, provides only for claims arising since the signature of the Claims Convention of July 4, 1868. The Claims Convention of December 4, 1868, between the U.S.A. and Peru,[5] may, however, have effected a true prescription of certain claims. There had been a Mixed Claims Commission (U.S.A. and Peru) established at Lima by a treaty of January 12, 1863,[6] to deal with outstanding claims, but this treaty did not bar claims then outstanding but not presented to the Tribunal. Any such claims, however, if arising out of transactions prior to November 20, 1863, could not have been considered under the Convention of 1868 (Article II), but would nevertheless have been finally barred by Article V of the

[1] Moore, *International Arbitrations*, p. 4743.
[2] Moore, *Digest*, Vol. VI, p. 1008.
[3] Moore, *International Arbitrations*, p. 4773.
[4] *British and Foreign State Papers*, Vol. 118, p. 1103.
[5] Moore, *International Arbitrations*, p. 4788.
[6] *Ibid.*, p. 4786.

same treaty. Such barrer, as we have seen, would have amounted to prescription—in this case of five years.

An interesting alternative to the absolute exclusion of ancient claims is provided by the Claims Convention between Guatemala and Mexico of January 26, 1888.[1] This was originally intended to provide a final settlement of all outstanding claims. But by a Modifying Agreement of February 15, 1889, all claims based on occurrences previous to the year 1873 were excluded from the competence of the Commissioners, who were to refer them to the respective Governments to be decided on by them without recourse to diplomatic intervention "except in case of denial of justice".[2]

III. *Treaties providing time-limits within which claims arising out of them must be preferred.*

Such treaties fall into two classes.

(*a*) In the first class the claim arises directly against the State, and its barrer is a true prescription in international law. The only example found is an Agreement between H.M. Government in Great Britain and the Government of the Republic of Hayti concerning the Direct Exchange of Parcels by Parcel Post.[3] The two Administrations undertake liability for the loss of parcels (Article XVII) subject to certain exceptions, which include the case where inquiry has not been made within one year from the date of posting (Article XVI). A year's silence therefore bars any subsequent claim against either Government.

Doubtless there are other examples of this class of treaty, and with the modern extension of State activities such provisions may be expected to become more common.

(*b*) In the second class the claim does not arise directly against the State, but is a private one to which the parties to the treaty have agreed to give effect in their municipal systems. They further agree upon the periods of prescription which, in their respective municipal systems, shall bar such claims. The case is considered here since, though such claims appear to be of a purely private nature, refusal to give effect to them would amount to the breach of an international treaty.

Illustrations of this class are an Exchange of Notes between Great Britain and Denmark establishing an Agreement respecting

[1] *British and Foreign State Papers*, Vol. 81, p. 258.
[2] *Ibid.*, p. 259.
[3] *Treaty Series*, 1928, No. 18.

Matters of Wreck, September 28, 1918,[1] and the International Conventions for the Unification of Certain Rules of Law respecting (1) Collisions between vessels; and (2) Assistance and Salvage at Sea, September 23, 1910.[2] In the former case claims by Consular Officers to goods belonging to a wreck must be satisfied "within the period fixed by the laws of the country"; in the latter, actions for recovery of damages resulting from collision and salvage actions are barred after an interval of two years (less in certain cases), while the grounds upon which these periods of limitation may be suspended or interrupted are to be determined by the law of the court where the case is tried.

IV. *General Treaties of Arbitration.*

In no case has a general arbitration treaty been found which provides a period of prescription for claims which may be preferred under its provisions. Nor, it may be said with some confidence, would the provision of such periods come within the rules of procedure which arbitration tribunals are frequently empowered to make for themselves. The chances of a question of prescription arising in a case where there is a general obligation to arbitrate is, however, much diminished by the practice of excluding from such obligation all disputes arising prior to its acceptance or relating to situations or facts prior to such acceptance.[3] Prescription in such a case would only be relevant after some appreciable time, always provided that the obligation to arbitrate was not undertaken for a period of years only, or, if so undertaken but renewed, did not then again exclude disputes arising or relating to situations or facts prior to its renewal.

III

When the practice of arbitral tribunals is examined it is believed that the following principles emerge.

(A) If, owing to the negligence of the plaintiff government or of the party injured, there has been unreasonable delay in presenting a claim, then, provided that the defendant government, having had no contemporary record of the facts, is placed at a disadvantage in establishing its defence, lapse of time will operate in his favour as a defence in itself.

[1] *British and Foreign State Papers*, Vol. 114, p. 197.
[2] *Treaty Series*, 1913, No. 4, pp. 51, 67.
[3] e.g. the British Reservations to the General Act. *Treaty Series*, 1931, No. 32.

It is proposed to establish the different parts of this proposition in the following order:

(1) There must be delay in the *presentation* of the claim.

No case has been found in which a claim duly presented has been held to be barred by mere failure to prosecute it diligently. That failure to press, for good reasons (i.e. without negligence), is no bar has been held by Plumley, Umpire, in the *Stevenson* case,[1] and by Sir Edward Thornton in the "*Canada*".[2] Sir Edmund Monson went further in the *Carlos Butterfield* claim[3] when he held that neither Butterfield nor the U.S. Government had used due diligence in the prosecution of the claim, but that though this was ground for legitimate criticism by the Danish Government it could not bar recovery. In the *Roberts* case[4] non-prosecution for twenty-eight years was held no bar, on the ground that this would enable Venezuela to take advantage of its own wrong in refusing to make reparation at the time the claim arose. It is submitted that arbitral practice on this point is correctly stated by Little, Commissioner, in delivering judgment in the *Williams* case:[5]

> "There are so many things that may induce one government not to press pending demands against another, disconnected with the demands themselves, consideration for the condition and welfare of the debtor state itself being prominent among them, that we are disposed to think the true and, so far as we are advised, the usual way is to regard time in such cases, in the absence of circumstances evincing abandonment, as no respecter of persons."

That this qualification "in the absence of circumstances evincing abandonment" is of importance will appear later.[6] It may be pointed out here that delay in pressing a claim need not operate unfairly, since the defendant has been given notice to prepare his defence by the timely presentation.

(2) The delay must be attributable to the negligence of the plaintiff government or of the party injured.

Where a claim of private origin is sponsored by a government, the dual nature of the claim permits the negligence of either party to be considered. But where the plaintiff government is in a position of speciál responsibility or trust towards the claimant or claimants, the case of the *Cayuga Indian Claims* is authority for saying that the negligence of the government only will not be

[1] *Venezuelan Arbitrations 1903, Ralston's Report*, p. 328.
[2] *U.S.A.* v. *Brazil.* Compromis 1870. Moore, *International Arbitrations*, p. 1745.
[3] *U.S.A.* v. *Denmark.* Compromis 1888. Moore, *op. cit.*, p. 1205.
[4] *Venezuelan Arbitrations 1903, Ralston's Report*, p. 144.
[5] *John H. Williams* v. *Venezuela.* Moore, *op. cit.*, p. 4199.
[6] See discussion of *Sarropoulos* case, *infra*, p. 94.

allowed to prejudice the claim. The Commissioners in that case felt themselves compelled to hold:[1]

". . . that dependent Indians, not free to act except through the appointed agencies of a sovereign which has a complete and exclusive protectorate over them, are not to lose their just claims through the laches of that sovereign, unless at least there has been so complete and bona fide change of position in consequence of that laches as to require such a result in equity."

Long delay in itself raises a presumption of negligence[2] but this may be rebutted by the evidence, for to operate as a defence it must be "fairly imputable to the claimant's laches". If not so imputable ". . . what the finding must be becomes a question of the preponderance of testimony merely, leaving each party to the misfortune time may have wrought for him in the support or in the defence of the claim".[3]

What amounts to negligent conduct will depend upon the facts of the case.

"To withhold causelessly a demand for goods until the witnesses to the transaction and other usual means of ascertaining the facts have, in the ordinary course, passed away, is negligent conduct; while to withhold a bond issued by public authority and of which presumptively a public register is kept for a like time after maturity may not be."[4]

Like the question of what amounts to unreasonable delay, with which it is inextricably bound up, the question of negligence is for the international judge or arbitrator to decide.

(3) There must have been no contemporary record of the facts.

No case has been found in which prescription has been admitted where the defendant had, or might have had, a clear record of the facts. That the *Sarrapoulos* case is only an apparent exception will be explained later.[5] In the case of the schooner *John*[6] before the British and American Claims Commission of 1853 there had been thirty-two years' delay in presentation, but a judicial record of the claims existed in the British Admiralty Court. Here, however, the reasons for delay were satisfactorily explained, so that prescription might have been barred on another ground. The dictum in the *Williams* case, *supra*, concerning public bonds, though quoted with approval in the *Gentini* case,[7] is also inconclusive, since it relates only to what may or may not be

[1] *American and British Claims Arbitral Tribunal 1910. Nielsen's Report*, p. 330.

[2] Cp. Borchard, *Diplomatic Protection of Citizens Abroad*, § 386.

[3] Little, Commissioner, in the *Williams* case. Moore, *International Arbitrations*, p. 4196.

[4] *Ibid.*, p. 4194.

[5] *Infra*, p. 94.

[6] Quoted in Moore, *International Arbitrations*, p. 1737.

[7] *Venezuelan Arbitrations 1903, Ralston's Report*, p. 730.

negligent conduct, and has no bearing on the problem whether a record of the facts will bar prescription even where negligence is established. But the principle was clearly applied in two cases by the Italian-Venezuelan Commissioners in 1903.

In the *Giacopini* case[1] thirty-two years had elapsed before a claim was presented, but the Commissioners found that the fiscal of the nation had been present when proofs were taken shortly after the incident complained of; he had cross-examined the witnesses and had been given a copy of the evidence. The government knowing in this manner of the existence of the claim had ample opportunity to prepare its defence. In these circumstances there was no danger of injustice to the defendant, and the defence of prescription failed. In the *Tagliaferro* case[2] thirty-one years had elapsed before presentation. But the injured party had at once complained to the judicial authorities and thence to the immediate representative of the nation.

"The responsible constituted authorities knew at all times of the wrongdoing, and if the complaint was baseless—an impossible conclusion under the evidence—judicial, military, and prison records must exist to demonstrate the fact. When the reason for the rule of prescription ceases, the rule ceases, and such is the case now."[3]

(4) The defendant must be placed at a disadvantage in establishing his defence.

This follows from the generally accepted view of prescription thus formulated by Ralston, Umpire, in the *Gentini* case. 'The principle of prescription finds its foundation in the highest equity—the avoidance of possible injustice to the defendant . . .'[4]

Thus, if the defendant has, or might have had, a clear record of the facts, or if the facts are admitted,[5] prescription will not lie.

This topic cannot be conveniently considered apart from the question of what amounts to unreasonable delay. The discussion of this point has, therefore, been postponed until now.

(5) The delay must be unreasonable.

This has never been stated in so many words by an arbitral tribunal. It is submitted, however, that this is in practice actually

[1] *Venezuelan Arbitrations 1903, Ralston's Report*, p. 765.
[2] *Ibid.*, p. 764.
[3] *Ibid.*
[4] *Ibid.*, p. 727.
[5] "As to any admitted or indisputable fact, the public law, not resting 'upon the niceties of a narrow jurisprudence but upon the enlarged and solid principles of state morality', we are inclined to think, would not oppose the lapse of time, except for the protection of intervening rights, should there be such, even where municipal prescription might." Little, Commissioner, in the *Williams* case. Moore, *International Arbitrations*, p. 4198.

required, and further that the normal measure of the unreasonableness of the delay is the disadvantage at which it may be apprehended that the defendant will be placed in establishing his defence.

In some cases there is no doubt as to the unreasonableness of the delay. In the *Spader* case[1] it was held that "a right unasserted for over forty-three years can hardly in justice be called a claim". In the case of *Gardner Mossman* v. *Mexico*, Thornton, Umpire, held:

"It seems unfair that the latter (the Mexican Government) should be first informed of the alleged misconduct of its inferior authorities more than fifteen years after the date of the acts complained of. The umpire cannot under this circumstance consider that the Mexican Government can be called upon to give compensation for a very doubtful injury."[2]

In the case of *Loretta G. Barberie* v. *Venezuela*, in the face of a delay of forty-five years, Mr. Finlay, for the Commissioners, said:

". . . we are of opinion that the consideration of such a case, even if we could ascertain with reasonable certainty what it was, would do violence to every principle of sound policy and open the door for the admission of any claim, however stale and obscure. . . . Great lapse of time is known to produce certain inevitable results, among which are the destruction or the obscuration of evidence, by which the equality of the parties is disturbed or destroyed, and, as a consequence, renders the accomplishment of exact or even approximate justice impossible."[3]

In other cases reference is made to the disadvantage at which delay has placed the defendant. Thus in the "*Mechanic*", Little, Commissioner, states:

"The demand was thirty-nine years old. It had been presented to the old Republic and not allowed. Venezuela now could not be supposed to have anticipated its resurrection. The witnesses to the transaction in 1824 had presumably passed away, and other means of defence become impaired."[4]

In the *Williams* case the same Commissioner said:

"The causeless withholding of a claim against a state until, in the natural order of things, the witnesses to the transaction are dead, vouchers lost, and thereby the means of defence essentially curtailed, is in effect an impairment of the right to defend. The public law in such cases, where the facts constituting the claim are disputed and disputable, presumes a defence."[5]

[1] *Venezuelan Arbitrations 1903, Ralston's Report*, p. 162.

[2] Moore, *International Arbitrations*, p. 4181.

[3] *Ibid.*, p. 4203.

[4] U.S.A. and Venezuela Claims Commission 1885. Moore, *International Arbitrations*, p. 3220. Owing, however, to the possible incompleteness of the record in this respect the case was dismissed on other grounds.

[5] Moore, *International Arbitrations*, p. 4195.

To a similar effect is the dictum of Plumley, Umpire, in the *Stevenson* case:

"When a claim is internationally presented for the first time after a long lapse of time, there arise both a presumption and a fact. The presumption, more or less strong according to the attending circumstances, is that there is some lack of honesty in the claim, either that there was never a basis for it or that it has been paid. The fact is that by the delay in making the claim the opposing party —in this case the government—is prevented from accumulating the evidence on its part which would oppose the claim, and on this fact arises another presumption that it could have been adduced. In such a case the delay of the claimant, if it did not establish the presumption just referred to, would work injustice and inequity in its relation to the respondent government."[1]

Once the defendant's disadvantage has been established it will have been noted that a further justification for the imposition of a bar is often given. Such justification, following the precedent of a similar rule of laches in English law, "appears most often under the guise of a presumption".[2] It is stated, for instance, that there arises a presumption of payment, or of abandonment, or of fraud, or of a good defence (see dicta in *Williams* and *Stevenson* cases above). But these justifiable presumptions, it is submitted, are little more than additional reasons justifying the imposition of a bar which the existence of the defendant's disadvantage (or an unreasonable delay as defined above) has already decided the arbiter to apply. They are reasons which justify, rather than reasons which impose the bar. They do not of themselves assist in the important task of deciding when they may be raised. Thus in the *Williams* case, where the defence of Venezuela was that the claim had been settled, the Commissioners finally decided, without calling upon Venezuela, that the presumption of settlement had not been overcome.[3] But in addressing itself to the question of when this presumption could be deemed to arise, the tribunal was guided by considerations similar to those that have been suggested.

"How is one in practice to know in a given case when it (i.e. prescription) arises, it may be enquired, since it has no fixed periods, and no analogies to guide one arising from limitation acts, such as obtain in courts of equity. A definitive answer it would be difficult to frame. But in general we should say, where, all

[1] *Venezuelan Arbitrations 1903, Ralston's Report*, p. 328.

[2] Brunyate, *Limitation of Actions in Equity*, p. 246. The rule of laches referred to is stated thus by Farwell J.: "Delay, no doubt, may in some cases be sufficient to prevent an applicant from obtaining relief, but so far as I can see the only case in which delay ought to have that effect is when the Respondent has been put to serious disadvantage, by the loss of his evidence or the like in consequence of the lapse of time and in consequence of the laches of the Applicant." (*Addley Bourne* v. *Swan & Edgar Ltd.*, (1903) 20 R.P.C. 105.)

[3] Moore, *International Arbitrations*, p. 4199.

the evidence considered, it appears from long lapse of time and as a result thereof ordinarily to have been apprehended, that material facts including means of ascertainment pertaining to support or defence are lost, or so obscured as to leave the mind, intent on ascertaining the truth, reasonably in doubt about them, or in 'danger of mistaking the truth', a basis for the presumption exists."[1]

The Commissioners were discussing here "'ordinary prescription' subject to be rebutted". But it will readily be seen that a presumption which only arises when the facts are thus obscured, placing as it does upon the plaintiff the burden of proving a negative, will not easily be rebuttable. To decide that the presumption arises will, therefore, be tantamount to a decision against the claimant. *When* it arises remains always the important question; and the answer suggested is "after unreasonable delay".

It must be doubted whether it is very helpful to treat prescription as a "rule of inference" raising a vague presumption or presumptions

"not necessarily perhaps that debts have been paid or titles granted, or other particular thing done, but that *something* at least has transpired which, in the *natural order*, as the Civilians say, forms a basis and demand for its operation."[2]

There seems to be no reason, for instance, why the presumption of subsequent abandonment or subsequent settlement should be excluded in the case where the facts giving rise to the original claim are clear. The presumption of a good defence is not open to this objection, but is fairly obviously a fiction. The presumption of fraud will only be raised when the claimant's evidence is weak, and this of itself should be a sufficient ground for dismissal of the claim.[3] It would probably lead to a clarification of the law if the main justification of prescription were admitted, as in the Conflict of Laws, to be simply the social interest[4] which requires *ut sit finis litium*. This point will be returned to later.

Among the factors which will determine the length of permissible delay the actual practice of states in dealing with claims is of supreme importance. The following considerations, however, must also be noticed. Public debts are more likely to be well evidenced than private ones, contractual debts than tortious. It is now probably permissible to admit prescription for claims based

[1] *Ibid.*, p. 4196.

[2] Little, Commissioner, in *Williams* case. Moore, *International Arbitrations*, p. 4192. Cp. Borchard, *op. cit.*, p. 831.

[3] Cp. the case of *Black and Stratton* v. *Mexico*. Moore, *International Arbitrations*, p. 3138.

[4] "La conception la plus généralement admise fonde la prescription sur l'intérêt social." de Lapradelle et Niboyet, *Répertoire de Droit International*, vol. 10, at p. 303.

upon the breach of a treaty. In the *King and Gracie* case,[1] the refusal to allow it may be justified on the separate ground that there was a clear record of the facts,[2] and, in any case, at this time it was doubtful whether prescription were admissible at all. In the later *Cayuga Indian* case,[3] based upon the Treaty of Ghent, there is little doubt that prescription would have been admitted to bar the British claim had the British Government been pleading solely on its own account.

(B) Lapse of time, combined with other facts, may amount to abandonment of a claim, either before or after presentation.

It is submitted that this principle explains the case of *Sarropoulos* c. *Etat bulgare*. Here the Greco-Bulgarian Mixed Arbitral Tribunal admitted the defence of prescription although there could be no dispute as to the facts or as to the responsibility of Bulgaria. But although the claim had been the subject of a diplomatic note in 1906, and on two subsequent occasions there had been general negotiations[4] between the two countries, no request for arbitration was made until 1921. In these circumstances the Tribunal held that

". . . ni la nature de ce Tribunal, ni le caractère d'exception qui lui est attribué par la Traité de Neuilly, ne le désignent pour évoquer une affaire qui remonte à une période de 18 ans, alors que les Puissances intéressées au règlement du conflit et qui, à deux reprises, ont eu l'occasion de faire aboutir ce règlement, n'ont pas pris soin d'en faire l'objet ni d'une solution ni même d'une réserve, et que, par la suite, le même silence a été observé par ces Puissances."[5]

If this case is taken as illustrating the effect of lapse of time operating as a defence in itself it is in advance of general arbitral practice, since it admits the defence even where the claim has been duly presented and the facts are clear. It has been thought worth while, however, to draw attention to it as illustrating the effect of lapse of time by way of acquiescence.[6] It will readily be seen

[1] U.S.A. and Great Britain Claims Commission of 1853. Moore, *International Arbitrations*, p. 4179.

[2] Ralston, *Law and Procedure of International Tribunals*, p. 380.

[3] *American and British Claims Arbitral Tribunal 1910. Nielsen's Report*, p. 307.

[4] Treaty of Alliance, May 16, 1912; Treaty of Bucharest ending the Balkan war of 1913.

[5] *Recueil des décisions des tribunaux arbitraux mixtes*, Tome VII (1928), p. 55.

[6] Another example is possibly the case of the Russian Indemnities. There was no express renunciation of the Russian right to moratory interest, but ". . . for 11 years and more, and up to a date after the payment of the balance of the principal there had not only been no question of interest between the two governments, but mention had been made again and again of only the balance of the principal." Scott, *The Hague Court Reports*, p. 322. This looks very much like contract or release by acquiescence. It has also been considered as a case of estoppel by acquiescence, see Lauterpacht, *Private Law Sources and Analogies of International Law*, p. 260, n. 2.

how much wider a scope is afforded to a defence of abandonment under this principle than to the "presumption of abandonment" said to be raised by the defence of lapse of time operating of itself. Other examples of "acquiescence" may be found in international law, but though there is room for the development of the principle in the law of claims, examples seem to be rare.[1]

IV

The final conclusion to be drawn is that the effect of lapse of time on claims in international law, taken as a whole, resembles more closely the English law of laches than either the *praescriptio longi temporis* (prescription) or the *praescriptio xxx vel xl annorum* (limitation of actions) of Roman law. Since the *Williams* case, 1885, which may be described as the leading case on the subject, "limitation" has been indeed definitely rejected as a "creature of legislative will" which "pertains to process, varies as a rule in all jurisdictions, and from time to time often arbitrarily in the same one, and admits occasional injustice".[2] "Prescription", on the other hand, it was said in the same case, "relates to substance, is the same in all jurisdictions, and aims at justice in every case".[3] The distinction relied on is taken from Markby, *Elements of Law*.[4]

"It is a general rule of jurisprudence that neither bona fides nor justa causa are in question when the defendant pleads limitation as a bar to an action. But it is also a general rule of jurisprudence that when it is asserted that a title has been gained by prescription, then the judge ought to see how the party got into possession, and ought not to allow a title to be acquired dishonestly, or, at least, he ought not to allow it to be acquired so soon."

[1] It is now generally admitted that a claim of private origin which is barred by the municipal law of a state cannot be adopted by the state of the claimant unless the grounds of the prescription itself can be put in issue according to the rules of international law. As this concerns the original admissibility of an international claim rather than the prescription in international law of a claim once properly grounded it has not been thought fit to treat of it as a separate principle. Reference may, however, be made to the following cases. *Pious Funds Arbitration* (Scott, *Reports of Hague Court of Arbitration*, p. 3). It should be noted that the claim in this case was something more than a claim of private origin, since it had in essence been previously the subject of an arbitral decision. Case of *George W. Cook* (No. 2) (U.S.A. and Mexico: General Claims Commission 1927, *Annual Digest 1927–8*, Case No. 174). In the *Recueil des décisions des tribunaux arbitraux mixtes: Renaud* c. *Etat allemand* (Vol. II (1923), p. 251), *Joestens* c. *Etat allemand*, (Vol. VII (1928), p. 564), *Carolina Collac* c. *Etat serbe-croate-slovène*, (Vol. IX (1930), p. 195). The facts of the "Lars Krogius" claims against Finland, 1930, were kindly supplied by H.M. Foreign Office.

[2] Little, Commissioner, in *Williams* case, Moore, *International Arbitrations*, p. 4192.

[3] *Ibid.* This is as difficult to follow as the preceding statement in the judgment that in Roman Law "*usucapio* indicated ownership acquired by enjoyment through long though undefined lapse of time" (p. 4191).

[4] 6th ed., § 560.

Without discussing the validity of this distinction (which, says Markby, was to a great extent "overlooked" in English law), it may safely be said that it is the analogy of "prescription" as thus described which has been followed by international tribunals. This is not altogether surprising when the necessity for judicial caution in the early stages of arbitration is remembered. The arbitrators, too, were often restricted, as in the compromis setting up Commissions in the Venezuelan Arbitrations, to the application of "absolute equity, without regard to objections of a technical nature". A court instructed to apply the "general principles of law recognized by civilized nations" would be entitled to go considerably further than a principle which still "finds its foundation 'only' in the highest equity—the avoidance of possible injustice to the defendant . . ."[1] "Limitation" also is recognized as a "general rule of jurisprudence". In the interests of peace and stability and for the quieting of disputes, there is much to be said for the bolder principle of imposing a penalty for the plaintiff's negligence. It has been seen from the examination of treaty practice that this principle is already recognized, at least to some extent, in positive international law.[2]

APPENDIX

RESOLUTIONS VOTEES PAR L'INSTITUT AU COURS DE SA XXXIIe SESSION

A. *Résolutions concernant la prescription libératoire en Droit International public.*

Preambule

L'Institut de droit international,

Ayant examiné la valeur de l'institution de la prescription libératoire dans les rapports internationaux, et constaté avec satisfaction que son étude a été retenue par le Comité d'experts institué par la Société des Nations pour la codification progressive du droit international;

Tout en s'abstenant d'arrêter quant à présent sur la matière une règlementation détaillée qu'il serait prématuré de recommander à l'adoption des Gouvernements;

Estime que les règles générales ci-après formulées doivent inspirer dans leurs sentences les arbitres et juges internationaux et peuvent utilement être complétées, notamment quant aux délais et aux causes de suspension et d'interruption, par des accords particuliers insérés spécialement dans les traités d'arbitrage obligatoire ou dans les traités d'établissement, de commerce, de navigation, de

[1] Ralston, Umpire, in the *Gentini* case, *Ven. Arb.*, 1903, p. 727.

[2] e.g. in Barrer Clauses of type (*b*) on p. 84 above.

propriété littéraire, artistique ou industrielle et en général dans les conventions de nature économique, sociale ou financière.

Règles générales en matière de prescription libératoire dans les rapports internationaux.

I. Des considérations pratiques d'ordre, de stabilité et de paix, depuis longtemps retenues par la jurisprudence arbitrale, doivent faire ranger la prescription libératoire des obligations entre Etats parmi les principes généraux de droit reconnus par les nations civilisées, dont les tribunaux internationaux sont appelés à faire application.

II. A défaut de règle conventionnelle en vigueur dans les rapports des États en litige, fixant le délai de la prescription, sa détermination est une question d'espèce laissée à la souveraine appréciation du juge international, qui, pour admettre le moyen tiré du laps de temps, doit discerner dans les circonstances de la cause l'existence de l'une des raisons par lesquelles la prescription s'impose.

III. Parmi les éléments propres à éclairer la religion [*sic*] du juge international, il convient de retenir:

(1) L'origine publique ou privée et le caractère contractuel ou délictuel de la dette qui fait l'objet du litige, la prescription devant, en règle générale, être plus difficilement admise pour les dettes publiques que pour les dettes d'origine privée, pour les dettes contractuelles que pour les dettes délictuelles;

(2) La circonstance que le retard de la réclamation s'applique à sa production ou simplement à son renouvellement, la prescription ne devant plus être admise dans la deuxième hypothèse s'il est établi en fait que l'inaction subséquente de l'Etat réclamant est imputable à la partie adverse ou à un cas de force majeure.

IV. La prescription d'une créance d'origine privée, conformément à la loi interne compétente, rend irrecevable la réclamation internationale, à moins que l'on ne puisse mettre en discussion, d'après les règles du droit international, le bien-fondé de cette prescription elle-même.

V. Le juge international ne peut suppléer d'office le moyen tiré de la prescription.

ACT OF STATE IN ENGLISH LAW: ITS RELATIONS WITH INTERNATIONAL LAW

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THE term, act of state, or matter of state, is usually associated in English Constitutional History with the conflicts of the seventeenth and eighteenth centuries and in particular with the great case of *Entick* v. *Carrington*[1] arising out of the General Warrants controversy. This case set at rest, though not so conclusively as has sometimes been asserted,[2] the claim of the Executive, already curtailed in many directions, to justify arbitrary interference with personal liberty or private property under cover of the plea of public interest or matter of state. In modern times act of state sometimes denotes the defence available to public servants against allegations of criminal or tortious acts committed by them in the course of duty. It follows from *Entick* v. *Carrington*; from the *Parlement Belge*,[3] where the principle was declared that the Prerogative does not extend to enabling modification of a rule of law administered in a British court—a principle not strictly necessary to the decision, but generally accepted as a correct statement of the law; and (*semble*) from *Walker* v. *Baird*,[4] that the plea that the conduct of an official was justified by the arbitrary powers enjoyed by the Executive is untenable in all cases against a plaintiff who is a British subject. Nor is such a plea available against an alien plaintiff, resident here, being the subject of a state at peace with His Majesty, in respect of injury inflicted upon him or his property within the jurisdiction by a public officer in the course of duty (*Johnstone* v. *Pedlar*).[5] It is available against a plaintiff who is the subject of a foreign state to justify injury done to him or his property, provided that the act complained of was committed on foreign territory[6] and was authorized or subsequently ratified by the Crown (*Buron* v. *Denman*).[7] Such an act may naturally raise

[1] (1765) 19 St. Tr. 1030.

[2] See *Elias* v. *Passmore*, [1934] W. N. 30; 50 T. L. R. 196.

[3] (1879) 4 P.D. 129; cf. (1880) 5 P.D. 197 for grounds of decision of Court of Appeal.

[4] [1892] A.C. 491. The point was raised but not determined.

[5] [1921] 2 A.C. 262.

[6] It is available also against the subject of an enemy state detained on British or (*semble*) occupied territory as a prisoner of war or civil internee, but not against an enemy alien who is permitted to reside by the Home Office.

[7] (1848) 2 Ex. 167.

important questions of international law, if the state of the injured foreigner takes up his cause. It is no concern of English municipal law.

It has not yet been decided whether this defence is available when the injury complained of is inflicted on property situated within the jurisdiction which belongs to an alien resident abroad. The point was raised, but not decided, in *Commercial Estates Co. of Egypt* v. *Board of Trade*,[1] a case decided as one of angary. The court held that angary as established at international law formed part of the municipal law of this country.[2] It may be argued from *Johnstone* v. *Pedlar* that act of state is no defence to the seizure of a neutral's goods, at all events as regards such goods as are found on British territory; goods on newly occupied territory would hardly seem to be within the protection of the courts before the formal act of cession or annexation, and seizure of these, apart from the law of angary, is, it is submitted, purely a matter of state, so far as the municipal courts are concerned. On the other hand, the majority of the Court of Appeal regarded the right of angary as a prerogative act, and as will be shown later, there appears to be no clear distinction between the legal effect of an act of state and an act authorized by the Prerogative.

From this result the question naturally arises of the relationship between international law and act of state as understood in English law. We may start the inquiry by admitting that the use of the term "act of state" is varied. The examination of various definitions which follows emphasizes that the narrow application of the term as a defence to what would otherwise be a tortious or criminal act does not explain its full scope.

Sir William Harrison Moore in his *Act of State in English Law*[3] speaks in his Introduction of matters, rather than acts, of state and says:

"In modern times . . . matter of state, much restricted in its scope, connotes that the relation to which it applies is not one of law, or, at any rate, of municipal law. The type of 'matter of state' is the matter between states, which, whether it be regulated by international law or not, and whether the acts in

[1] [1925] 1 K.B. 271.

[2] *Per* Bankes L.J., at p. 284. Angary is defined by Scrutton L.J. at p. 285 as the right claimed by belligerents to seize the goods of neutrals necessary for the prosecution of the war, found on the territory of, or occupied by, the belligerent, on paying fair compensation.

[3] Published in 1906; see also Lauterpacht, *The Function of Law in the International Community*, 1933, pp. 384–9; the author divides acts of state into four groups; he regards an act of state as a limitation on the unrestricted freedom of judicial decision and as not inconsistent with the rule of law.

question are or are not in accord with international law, is not a subject of municipal jurisdiction."

His inquiry ranges over a wide field and includes "facts of state", e.g. pronouncements on the status of foreign countries made to the courts by government departments and treated as authoritative as well as martial law, but deals largely with foreign relations. The opinion is expressed[1] that, while the seventeenth-century contests were fatal to the larger pretensions of the Prerogative, there remained an ill-defined sphere in which matter of state may enter into the administration of the law. In the rule of the Colonies, the Indian Native States and Protectorates, the Law Reports disclose a number of cases in which matter (or act) of state has been considered.[2]

Oppenheim's *International Law*[3] states:

"It is often maintained that a state, as a sovereign person, can have no legal responsibility whatever. This is only correct with reference to certain acts of a state towards its subjects. . . . Different from this internal autocracy is the external responsibility of a state to fulfil its international legal duties."

Appended to this passage is a footnote dealing with the defence known as act of state (see above). It is well established that the absolutism of the Executive in English law is confined to acts done under the Royal Prerogative, which include acts in relation to foreign states and their subjects resident abroad, as well as acts in relation to British subjects. It is preferable, it would seem, to confine the term "act of state" to acts of the former class, with which alone international law is concerned. Nor does the term "Royal Prerogative" include the numerous and nowadays more important statutory powers of the Crown, many of which appear to confer absolute discretion on the Executive. The courts control, chiefly through the Prerogative writs, the exercise of such powers

[1] p. 32.

[2] How ill defined the sphere is may be judged from the variety of definitions and explanations found in the authorities. The Evidence Act, 1851, s. 7, dealing with the proof of foreign and colonial acts of state and judgments, speaks of "all proclamations, treaties and other acts of state". In *In re Betts' Patent* (1862) (1 Moo. P.C. N.S. 49) official copies of a Belgian patent were received in evidence as acts of a foreign state. Stephen, *History of the Criminal Law*, confines the term to what may be called the *Buron* v. *Denman* meaning and states that an act of open war is accordingly not a crime (Vol. II, pp. 61, 65). Wheaton, *Law Lexicon* (13th ed., 1925, p. 18) defines it as "the act of the sovereign power of a country or its agent (if acting *intra vires*). By its very nature such an act cannot be questioned by any court of law". By "court of law" is meant a court administering municipal law.

[3] 4th ed. (McNair), Vol. I (Peace), p. 287; at pp. 641–2 a footnote gives instances of the conclusiveness in judicial proceedings of statements made by or on behalf of the Crown in international matters.

entrusted to the Crown and the Departments by the rule of *ultra vires* and the doctrine of abuse of principles of natural justice, though effectual control is apt to be diminished by the impossibility of suing the Crown in tort, save in a limited sphere by the indirect means of an action for a declaration.[1] What are left of the Prerogative powers at Common Law in relation to internal government are as much acts of state in the sense of being uncontrolled and uncontrollable by the municipal courts as are foreign relations, e.g. dissolution of Parliament, conferment of honours, use and disposition of the armed forces of the Crown.[2]

The subject receives full treatment in Keir and Lawson, *Cases in Constitutional Law*,[3] where the distinction between what may be called the external and the internal powers of the Prerogative is emphasized:

"At municipal law and in the eyes of municipal courts the Crown is absolute in relation to foreign affairs. Therefore it may act towards foreign states and their subjects outside the realm in a perfectly arbitrary fashion; towards them the Crown has no duties, but only powers. Such powers are not strictly speaking a part of the Prerogative. . . ." citing Warrington L.J. in *In re Ferdinand, Ex-Tsar of Bulgaria*.[4]

The passage continues:

"The acts of the Crown in foreign affairs are called acts of state—*nowadays they are the only acts of state*—and their validity cannot be questioned in any British court."

It is recognized that the Crown is bound to act in accordance with international law, but no means exist in municipal law of enforcing the obligation; further that this immunity must be shared by servants of the Crown, citing *Buron* v. *Denman*. But it is conceded that the term has a wider meaning than authority for an act of violence. Indeed *Buron* v. *Denman* is not even cited in the judgment to which reference is made hereafter,[5] and which the authors regard as the best judicial treatment of the subject. The conclusion is that "all that the Crown does in the sphere of foreign affairs falls within the category of acts of state".

It is not easy to distinguish the legal nature of acts done by the

[1] *Dyson* v. *Attorney-General*, [1911] 1 K.B. 410; *Bombay and Persia Steam Navigation Co.* v. *Maclay*, [1920] 3 K.B. 402.

[2] As to the last-named, see *China Navigation Company* v. *Attorney-General*, [1932] 2 K.B. 197.

[3] 2nd ed. 1933, pp. 295–8.

[4] [1921] 1 Ch. at p. 139: "Prerogative properly describes the power and authority of the King in relation to his subjects, and not rights vested in him in relation to persons owing no allegiance to him."

[5] *Salaman* v. *Secretary of State for India*, [1906] 1 K.B. at p. 639.

Crown at its discretion within and without the realm. If acts of state are beyond the control of the courts, so are Prerogative acts in relation to the subject. The courts can merely decide whether an act properly falls within the limits of the Prerogative; within those limits the Crown is absolute.[1]

Finally we turn to the judgment of Fletcher Moulton L.J. in *Salaman* v. *Secretary of State for India*[2]—a case arising out of the annexation of an Indian Native State by the old East India Company—for a judicial statement of what is an act of state.

"An act of state is essentially an exercise of sovereign power, and hence cannot be challenged, controlled, or interfered with by municipal courts. Its sanction is not that of law, but that of sovereign power, and, whatever it be, municipal courts must accept it, as it is, without question. But it may, and often must, be part of their duty to take cognizance of it. For instance, if an act is relied upon as being an act of state, and as thus affording an answer to claims made by a subject, the courts must decide whether it was in truth an act of state, and what was its nature and extent. An example of this is to be found in the case of *Forester* v. *Secretary of State for India in Council*.[3] But in such an inquiry the court must confine itself to ascertaining what the act of state in fact was, and not what in its opinion it ought to have been. In like manner municipal courts may have to consider the results of acts of state, i.e., their effects on the rights of individuals, and even of the Government itself. Acts of state are not all of one kind: their nature and consequences may differ in an infinite variety of ways, and these differences may profoundly affect the position of municipal courts with regard to them. For instance, an act of state may fix the relations between two states, each of which continues to possess an independent existence. The consequences of such an act of state are entirely beyond the cognizance of municipal courts, because they do not administer treaty obligations between independent states. An example of such an act of state may be found in the case of *Nabob of Carnatic* v. *East India Co.*[4] But the object and effect of an act of state are not necessarily of this kind. Its intention and effect may be to modify and create rights as between the Government and individuals, who are, or who are about to become, subjects of the Government. In such cases the rights accruing therefrom may have to be adjudicated upon by municipal courts. Let me take a simple example. Let us suppose that a Government by an act of state annexes a neighbouring country, and formally takes over all the property and liabilities of the former ruler, and that a part of such property consists of debts due to him. The Government is not

[1] The term "act of state" is discussed in Halsbury, *Laws of England* (1st ed., Vol. XXIII, Arts. 638 ff.) under the title "Public Authorities and Public Officers". It is recognized that the expression is not a term of art and is used in different senses by different authorities. Two kinds of acts are included, namely (1) acts which done by private individuals would be criminal or tortious; (2) acts which can only be performed by a supreme government, such as treaties, declarations of war. But the term is regarded as descriptive of the existing residuum of the Prerogative, e.g. it includes the dismissal of an army officer.

[2] [1906] 1 K.B. 613, at pp. 639–41; cited fully by Keir and Lawson, *op. cit.*, at pp. 297–8.

[3] (1872) L.R. Ind. Ap. Supp. vol. 10.

[4] (1793) 2 Ves. Jr. 56.

compelled to collect such debts *vi et armis*; it may avail itself of the assistance of its courts of law for the purpose, in the same way as though the debts had accrued due to it otherwise than by an act of state. But in deciding on such a claim the courts must loyally accept the act of state as effective. Evidence that the debt was due to the former ruler would thereby become evidence of its being due to the existing Government; and I see no reason why in such a case a claim of a converse character might not equally be entertained by municipal courts, and a subject recover from the existing Government by the processes of law applicable to such a case any debts due from the former ruler. The judgments in the case of *Frith* v. *Reg.*[1] seem to me to give support to this view.

"The true view of an act of state appears to me to be that it is a catastrophic change, constituting a new departure. Municipal law has nothing to do with the act of change by which this new departure is effected. Its duty is simply to accept the new departure; and its power and its duty to adjudicate upon, and enforce rights of individuals, or of the Government, in the future, appear to me to be precisely the same whether the origin of such rights be an act of state or not. But, although this be so, it must not be supposed that the principles of interpretation applicable to an act of state are the same as those which apply to other acts. For instance, if an act of state be expressed in a document purporting to confer benefits on an individual, it by no means necessarily follows that there is any intention to create a contract, or that the document should be construed by the same canons of interpretation as would be adopted in the case of a contract between two individuals. A Government in the exercise of its sovereign power may well desire to reserve to itself discretionary powers quite inconsistent with contractual relations. There is no presumption in the case of an act of state that this is not the case, and, if the language of the document and the circumstances of the case point to such a conclusion, the court is bound to accept it, however vague and indefinite it may make the effect of the act of state. An example of this is to be found, in my opinion, in the present case, though for other reasons it may not be necessary to decide the point."

From this passage it is clear that international law provides the only sanction to an act of state, but (1) it may be part of the duty of municipal courts to take cognizance of it, and further (2) such courts may have to consider the results of it, i.e. its effect on the rights of individuals and even of the Government itself.

The conclusion is that an act of violence authorized by the state, where such authorization is permissible,[2] is as much an act of state, neither more nor less, except as regards the degree of importance in international affairs, as a treaty of annexation between two independent states. Act of state means an act of the Executive as a matter of policy performed in the course of its relations with another state, including its relations with the subjects of that state, unless they are temporarily within the allegiance of the Crown.

[1] (1872) L.R. 7 Ex. 365.

[2] See *Buron* v. *Denman* (above).

The following points seem to call for consideration by international lawyers.

1. Since a municipal court is bound by an act of state, what if the act of state is a violation of international law?

2. In relation to the cession of territory by articles of capitulation by which territory is surrendered (or articles of peace by which it is ceded), are there any rules of constitutional law limiting the power of the Crown which the municipal courts will enforce?

With these two points the rest of this article is concerned, but it is permissible to mention that there are further questions of interest raised by *Salaman's* case.

3. How far, if an act is relied upon as being an act of state, does it afford an answer to a claim made by a subject?

4. Since municipal courts may have to consider the results of an act of state, what is its effect upon the rights of individuals and even of the Government itself?

(1) *Act of state as a violation of international law.*

Since an act of state is conclusive in English law and deals with matters beyond the jurisdiction of municipal law, it would seem to follow that the fact of the Executive having violated international law affords no objection to which the courts could give effect.[1] Discussing the relationship between international law and English law, Oppenheim states the following propositions:[2]

(i) All such rules of customary international law as are universally recognized, or have at any rate received the assent of this country, are binding upon British courts, unless they be in conflict with British statutory law.[3]

(ii) As to law-making international conventions ratified by this country, when international engagements require for their enforcement a modification of the law (common law or statutory) administered in our municipal courts, the necessary statute must be passed.[4]

But neither of these propositions, it is submitted, enables the court, where it is bound by an act of state which violates a rule of international law, to disregard that act solely on the ground that, being in conflict with international law, it is thus contrary to municipal law. For the act is in a sphere where the municipal law does not operate.

[1] Cf. Harrison Moore, *op. cit.* See pp. 99–100 above.

[2] *Op. cit.*, Vol. I, p. 31 and n. 3.

[3] *Mortensen* v. *Peters* (1906), 8 F., esp. *per* Lord Dunedin at p. 100.

[4] See A. D. McNair, *B.Y.I.L.*, 1928, pp. 59–68.

The view which the courts of this country accept as to the primacy of municipal law is discussed in *The Zamora*, where Lord Parker of Waddington,[1] after stating that a Prize Court is a municipal court, though administering international law, says:

"The distinction between municipal and international law is well defined. A court which administers law is bound by and gives effect to the law as laid down by the sovereign state which calls it into being. It need inquire only what that law is, but a court which administers international law must ascertain and give effect to a law which is not laid down by any particular state, but originates in the practice and usage long observed by civilized nations in their relations towards each other and in express international agreement. It is obvious that, if and so far as a Court of Prize in this country is bound by and gives effect to Orders of the King's Council purporting to prescribe or alter the international law, it is administering not international, but municipal, law; for an exercise of the Prerogative cannot impose legal obligation on any one outside the King's dominions who is not the King's subject."

If the municipal system treats certain acts of the sovereign power, be they in regard to internal or external policy, as conclusive, it is not competent for the municipal courts to control these acts, as they are outside their jurisdiction. Their legality or illegality in another jurisdiction, that of international law, is irrelevant. But they may be called upon to consider the effect of these acts of the sovereign power upon the rights of individuals, and in so doing may be forced to uphold a breach of international law. To take a clear, though improbable, example: if Great Britain were to order the ill treatment of an alien on foreign territory by a military or naval officer, or what is a more probable contingency, were to ratify such officer's act in order to protect him from its consequences, the municipal courts here would be bound to recognize the act of state, even though the treatment meted out to the alien violated a treaty obligation or some established rule of international law. Such a case, should it arise, would conflict with Oppenheim's first proposition.

In *West Rand Gold Mining Co.* v. *The King*[2] the suppliant company based its claim on a doubtful rule of international law, which the Divisional Court declined to accept, namely that the Sovereign of a conquering state is liable for the obligations of the conquered state. The claim was treated as if the contractual duty on the Transvaal Government to return the Company's gold requisitioned by that Government had by implied novation passed to the British Government on annexation of the Transvaal. The court, while

[1] [1916] 2 A.C. 77, at p. 91.

[2] [1905] 2 K.B. 391.

rejecting this view of international law, proceeded to deal with the remainder of the argument, which was (1) that international law forms part of the law of England, and (2) that rights and obligations, which were binding upon the conquered state, must be protected and can be enforced by the municipal courts of the conquering state. Strictly speaking, on the finding against the existence of the international law rule, the judgment of the court on the remainder of the argument is *obiter*, but the following passage seems to throw a light upon the present inquiry:[1]

> "Whatever has received the common consent of civilized nations must have received the assent of our country and that to which we have assented along with other nations may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals, *when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant.*"

It is not a legitimate occasion when the statute law is opposed to the accepted international law rule, nor when the courts are bound to accept an act of state the contents of which are beyond their control. If the act of state be an act of violence, as in *Buron* v. *Denman*, it may well constitute an offence in international law, but it cannot give rise to any cause of action in an English court.

The well-known case of *The Queen* v. *Keyn*,[2] in which it was held by a majority of one judge in a full Court for Crown Cases Reserved that English courts had no jurisdiction over crimes committed by foreigners within the English maritime belt, may be used to serve as an illustration of what would, but for the decision, have been a "legitimate occasion". Prior to the Territorial Waters Jurisdiction Act 1878, the sequel to this decision, no statute extended the courts' jurisdiction over the maritime belt. International law, though two of the majority judges held otherwise, even at that date probably recognized this wider range of a state's jurisdiction. It would accordingly have been open to the court to presume that the international law rule prevailed, since it conflicted in no way with statute law or the common law, neither of which had hitherto been applied to the territorial belt. The state would be claiming as a matter of state the extended jurisdiction over foreigners which was granted by international law, and the court could have accepted this as conclusive.[3]

[1] At pp. 406–7, *per* Lord Alverstone C.J.

[2] (1876) 2 Ex. D. 63.

[3] Against this view it can be contended that any extension of jurisdiction affects the rights both of subjects and resident aliens and therefore can only be effected by statute.

(2) *Rules limiting the power of the Crown in relation to cession of territory.*

The existence of such rules has often been asserted and as often denied by the courts, and it is not easy to state with any certainty the extent to which the rules can be enforced. In *Amodu Tijani* v. *Secretary, Southern Nigeria*,[1] Lord Haldane, delivering the opinion of the Board, says: "A mere change in sovereignty is not to be presumed as meant to disturb the rights of private owners; and the general terms of a cession are *prima facie* to be construed accordingly." Against this we have the answer of the Divisional Court to the contention of the suppliant company in the *West Rand* case, which goes to show that taking possession, whether by cession or by any other means by which sovereignty can be acquired, is an act of state and that no municipal tribunal can enforce any obligations thereby incurred. The line of authority extends from *Nabob of the Carnatic* v. *East India Company*[2] to *Cook* v. *Sprigg*, where the following statement of law is made:[3]

"It is a well-established principle of law that the transactions of independent states are governed by laws other than those which municipal courts administer. It is no answer to say that by the ordinary principles of international law private property is respected by the Sovereign which accepts the cession and assumes the duties and the legal obligations of the former Sovereign with respect to such private property within the ceded territory. All that can be properly meant by such a proposition is that, according to the well-understood rules of international law, a change of sovereign by cession ought not to affect private property, *but no municipal tribunal has authority to enforce such an obligation*."

That the effect of a treaty was not intended to confer rights on the subject, but was solely a matter of international obligation, in which the Crown was neither the agent nor a trustee for the subject, has recently been maintained by the House of Lords in *Civilian War Claimants' Association Ltd.* v. *The King*,[4] following *Rustomjee* v. *The Queen*.[5] These cases dealt with claims to money held as part of the public funds, and Parliamentary sanction would have been necessary to the appropriation of the money. Lord Atkin in the former case (at p. 26) says:

"When the Crown is negotiating with another Sovereign a treaty, it is inconsistent with its sovereign position that it should be acting as agent for the nationals of the sovereign state, unless indeed the Crown chooses expressly to declare that it is acting as agent."

[1] [1921] 2 A.C. 399, at p. 407.
[2] 1 Ves. Jr. 371; 2 Ves. Jr. 56.
[3] [1899] A.C. 572, at p. 578.
[4] [1932] A.C. 14.
[5] (1876) 1 Q.B.D. 487; 2 Q.B.D. 69. And see *German Property Administrator* v. *Knoop*, [1933] 1 Ch. 439.

If we are to reconcile Lord Haldane's view in the *Amodu Tijani* case with the long line of authority to which we have just referred, it can only be by regarding some acts of annexation as conferring rights upon the subject-to-be, while others do not confer enforceable rights. No formality is required for the act of state known as annexation,[1] which can clearly take place without the creation of any enforceable rights. On the other hand, such rights may formally be created as part of the act of state, which is binding upon municipal courts and can be enforced by persons who have become subjects by that act. The authorities deal mainly with cases where the territory has been acquired from native rulers and others whose status as international persons is not recognized, at all events fully, but there is no reason why the attitude of the courts towards the enforcement of terms of cession should differ if the territory has been acquired from a state whose personality is fully recognized.

Lord Mansfield in *Campbell* v. *Hall*[2] limited the Crown's right to legislate as a matter of state in respect of conquered or ceded territory in three ways; of these the first two are of immediate interest:

1. The articles of capitulation upon which the country is surrendered and the articles of peace by which it is ceded are "sacred and inviolable".

2. The Crown may not make any new laws "contrary to fundamental principles".

3. Privileges may not be given to the inhabitants of the conquered territory which are "exclusive of the other subjects of the Crown".

These limitations suggest that an undertaking given by the Crown upon cession can be enforced by a municipal tribunal. Fletcher Moulton L.J. in *Salaman's* case[3] suggested that the intention of an act of state might be to modify or create enforceable rights between the Government and those who are about to become subjects. If this is so, the court not merely can, but must, give effect to that intention, if it does not conflict with existing municipal law. In cases like *Civilian War Claimants' Association* no such intention was deduced by the court from the acts of state upon which the claimants, existing British subjects, based their claim to redress.

Cook v. *Sprigg* is difficult to reconcile with Lord Mansfield's limitations on the powers of the Crown, as are some of the cases

[1] *In re Southern Rhodesia*, [1919] A.C. at p. 238.

[2] (1774) Lofft 665; 1 Cowp. 204.

[3] [1906] K.B., at p. 640.

dealing with protectorates, though the latter may be explained by the difficulty of maintaining an established system of law in the protected area.[1] *Cook* v. *Sprigg* arose out of the annexation of Pondoland to Cape Colony by an Act of the Legislature of that Colony, passed in consequence of a deed of cession made by Sigcau, the native ruler. The claimants were grantees of certain concessions made to them by Sigcau prior to the cession, and complained of interference with these concessions by the Government of the Colony. There was some dispute as to the validity of the grants, upon which the Supreme Court of the Colony found against the claimants. But the Judical Committee, without differing from the Supreme Court on this point, decided the case on the grounds which have been cited above,[2] treating the municipal court as incompetent to enforce the terms of cession between independent rulers as conferring rights enforceable in municipal law upon their subjects.

Sir William Harrison Moore[3] contrasts this case with *Sprigg* v. *Sigcau*[4] arising out of the same annexation. Sigcau had been arrested under a special proclamation of the Governor of Cape Colony, which the Board held to be an excess of the powers delegated to him by the Annexation Act and ordered the release of Sigcau on the ground that the proclamation was an invasion of the individual rights and liberties of a British subject. In other words act of state was excluded since Sigcau had been received into British protection. The learned author rightly, it is submitted, inquires why the right of property in *Cook's* case was not equally with the right of personal security in *Sigcau's* case under the protection of the courts. If we accept this criticism, the authority of *Cook's* case is considerably weakened, and moreover, as has been stated above, the Board went out of its way in that case to exclude the jurisdiction of the municipal court, with whose decision they were nevertheless prepared to agree.

On the other hand, the Board held in *Amodu Tijani* v. *Secretary, Southern Nigeria* that a usufructuary title vested in a native chief

[1] See *The King* v. *Earl Crewe, ex parte Sekgome*, [1910] 2 K.B. 576, especially *per* Vaughan Williams L.J. at p. 609: "The idea that there may be an established system of law to which a man owes obedience and that at any moment he may be deprived of the protection of that law, is an idea not easily accepted by English lawyers. It is made less difficult if one remembers that a protectorate is over a country in which a few dominant civilized men have to control a great multitude of the semi-barbarous." Cp. *Sobhuza II* v. *Miller*, [1926] A.C. 518, where Orders in Council were upheld, though not within the powers recognized by the Convention.

[2] p. 107. [3] *Op. cit.*, pp. 76–80. [4] [1897] A.C. 218.

on behalf of his community was not affected by cession to the Crown, and awarded full compensation on this basis when land held on this title was, after annexation, acquired for public purposes. It was allowed that the radical title as a result of the cession passed to the British Crown, but was qualified throughout by usufructuary rights existing at the time of the cession, "rights which as the outcome of deliberate policy have been respected and recognized". Lord Haldane continues:[1]

"Even when machinery has been established for defining as far as is possible the rights of individuals by introducing Crown grants as evidence of title, such machinery has apparently not been directed to the modification of substantive rights, but rather to the definition of those already in existence and to the preservation of records of that existence."

There follows[2] a summary of the relations of the chiefs in Lagos to the British Crown, which emphasizes the interpretation placed by the British Government upon the treaty of cession. In particular:[3]

"No doubt there was a cession to the British Crown, along with the sovereignty, of the radical or ultimate title to the land in the new colony, but this cession appears to have been made on the footing that the rights of property of the inhabitants were to be fully respected. This principle is a usual one under British policy and law when such occupations take place. The general words of the cession are construed as having related primarily to sovereign rights only. . . . Where the cession passed any proprietary rights, they were rights which the ceding king possessed beneficially and free from the usufructuary qualification of his title in favour of his subjects.

"In the light afforded by the narrative, it is not admissible to conclude that the Crown is generally speaking entitled to the beneficial ownership of the land as having so passed to the Crown as to displace any presumptive title of the natives."[4]

The conclusion, as has already been stated, is that a mere change of sovereignty is not to be presumed to disturb rights of private owners; *and the general terms of a cession are prima facie to be construed accordingly.* So far then from regarding the cession —an act of state—as a matter beyond their competence, the Judicial Committee examined the effect of it upon the rights of the

[1] [1921] 2 A.C., at p. 404. [2] pp. 405–8. [3] p. 407.

[4] See also *Attorney-General of Southern Nigeria* v. *Holt*, [1915] A.C. 599, at p. 609; *Oduntan Onisiwo* v. *Attorney-General of Southern Nigeria*, 2 Nig. L.R. 77; *Sunmonu* v. *Disu Raphael*, [1927] A.C. 881. In *Sobhuza II* v. *Miller*, [1926] A.C. 518, Lord Haldane admits that the usufructuary rights may be extinguished by the action of a paramount Power which assumes possession or the entire control of the land; the last-named case concerned a protectorate where an Order in Council is an unchallengeable method of extending British dominion.

inhabitants of the ceded territory and enforced those rights as a matter of municipal law.

In *Eshugbayi Eleko* v. *Government of Nigeria*,[1] Lord Atkin sees the necessity of reconciling suggested powers of appointment or deposition of native chiefs by the Governor under the authority of his Letters Patent or his Instructions with the rights of the native communities laid down by Lord Haldane in the earlier case. Again the case was from Lagos, and effect was given to the view that native customs, antecedent to cession, are justiciable issues as between the Executive and the native subjects. The Board declined to accept the opinion of the Executive in the colony that the local courts were incapable of deciding the question whether the authority or control of a native is recognized by a native community.

Finally there are some observations by the court in *The North Charterland Exploration Company* v. *The King*,[2] which suggest that the limitations imposed by *Campbell* v. *Hall* have no further operation since the Foreign Jurisdiction Act 1890. Upon this it may be remarked that the Act has no application to a colony, and we have already explained[3] why different considerations may apply to the maintenance of an established system of law in a protectorate. The position, however, is not free from doubt, as expressions frequently occur, as in *Sobhuza II* v. *Miller*[4] and in *The North Charterland* case itself, to the effect that jurisdiction acquired by the Crown in a protected country is indistinguishable in legal effect from that acquired by conquest. The explanation of such apparently conflicting decisions as *Cook's* case and *Amodu Tijani's* case may be in the latitude permissible to the Judicial Committee which has enabled it to interpret the exercise of the prerogative powers of the Crown sometimes in the direction of autocratic rule, sometimes in accordance with the spirit of articles of cession embodying a policy of protecting pre-cession rights.

The conclusion is that there is authority for the proposition that the municipal courts will endeavour to enforce limitations on the powers of the Crown, whether legislative or executive, if the Crown violates undertakings given by the articles of cession and, on the authority of *Amodu Tijani's* case, such undertakings need not be express, if they can be deduced as a matter of policy. Thus the municipal law lends its aid to the enforcement of obligations arising directly out of international engagements, if it be permissible

[1] [1931] A.C., at p. 672.
[2] [1931] 1 Ch., at pp. 186–7.
[3] p. 109 above.
[4] [1926] A.C. 518.

so to style articles of cession between Great Britain and native chiefs. Normally the contents of treaties confer no enforceable rights on the subjects of the contracting parties, and legislation amplifying the local law to bring it into line with the provisions of the treaty is required to create such rights. Accordingly the occasions for the application of the proposition are limited.

DO TREATIES NEED RATIFICATION?

By G. G. FITZMAURICE, B.A., LL.B.

I

THE above question is one which is fairly often asked, sometimes in a slightly different form such as "When do treaties need ratification?" or "What kinds of treaties need ratification?" These questions are all, it would seem, framed in a rather "unreal" way. Actual practice is such that in a sense it may be said that treaties never now "need" ratification unless they themselves so provide (this statement requires a good deal of qualification, however). A better way of putting the point would perhaps be "in what circumstances can it be maintained that a treaty (or other international agreement) is invalid and of no binding effect for want of ratification?" But whichever way the question is put it will scarcely admit of a simple answer because there seems to be more than one criterion with reference to which the answer may be given. The term "ratification" is used (though, it is suggested, often incorrectly) in more than one sense; and the same treaty may or may not require "ratification" according to whether the matter is considered from the point of view of the general rules of international law, the specific provisions of the treaty itself, or the internal constitutional law of one or other of the contracting parties.

It is important to realize that the term "ratification" is used in two different senses. Apart from those cases (nowadays very rare) in which ratification is made by conduct, i.e. by proceeding to execute the treaty,[1] the normal and technically correct use of the term is that which denotes the formal act by which the con-

[1] On account of its rarity ratification by conduct, to which a good deal of space is devoted in treatises on international law, is not specifically dealt with in this article. It is, as a matter of fact, dubious how far, in modern practice, ratification by this method is possible. The vast majority of modern agreements requiring ratification contain a specific clause providing for the definite *exchange* of *instruments* of ratification, and moreover causing the treaty to come into force on the date of such exchange. Failing such an exchange, therefore, it might well be argued that the treaty could not, as a *binding obligation*, come into force, however much acted upon, and that if one of the parties chose in point of fact to grant to the other the privileges accorded by the treaty it did so *ex voluntate* and was entitled to cease doing so at will. The position would no doubt be different if the treaty was acted upon by one of the parties in such a manner as to cause the other to change his position, or so as to benefit by rather than to give privileges. In such a case the other party could no doubt contend that the first party was precluded and estopped from denying the binding nature of the treaty, although no ratification as contemplated thereby had taken place. Alternatively there might be a claim for damages, according to the circumstances.

tracting party concerned gives its final acceptance to the treaty and intimates this acceptance to the other party.[1] This act is of course carried out by the executive organ of the contracting party concerned, and may for convenience be styled ratification proper, or ratification in the international sense of the term. In another sense (but, it is suggested, strictly speaking an incorrect sense), the term is used to denote the internal constitutional act whereby some organ other than the executive (usually the legislature), approves of, and authorizes, the treaty from the domestic constitutional point of view. This may be styled "ratification" in the constitutional sense, as for instance when it is said that no treaty can become binding on the United States of America unless it has been "ratified" by the Senate. Another example of the same thing occurs in the United Kingdom in regard to that limited class of treaties (e.g. cessions of territory) which, according to a convention of the constitution, may require the approval of Parliament, even though no legislation is necessary in order to enable them to be implemented.[2] The effect of "ratification" in the constitutional sense in cases where ratification in the strict international sense is necessary, is to put the executive organ of the government in a position to accomplish the latter. In cases where it is not necessary, and the treaty comes into force on signature, or on a specified date, the effect of "ratification" in the constitutional sense is simply to put the country concerned in a position in which, from the purely domestic *constitutional* point of view, it can legally be, or become, a party to the treaty.

It should particularly be noticed that "ratification" in the constitutional sense does not, and, it is suggested, cannot, operate *per se* to make the country concerned a consenting party to the treaty from the international point of view. Either that country has already purported to become such a consenting party, and to

[1] It is suggested that the actual act of ratifying (e.g. the drawing up and signing of the instrument of ratification) and the subsequent communication of it to the other party must be regarded as a whole, even though the former alone is usually known as "ratification", the latter being known as the "deposit" (or "exchange") of the instruments of ratification. The mere drawing up and signing of an instrument would not be enough without its communication or *a* communication to the other party. Invariably in practice, ratification is made in writing, and the actual instrument is deposited or exchanged. But in theory there seems to be no reason why it should not be made verbally by some one duly authorized to that effect, and in that case the act of ratifying and of communicating the ratification to the other party would be simultaneous.

[2] It is important to distinguish between "ratification" in the constitutional sense and the quite distinct process whereby legislation is passed, not for the purpose of approving a treaty, but for the purpose of enabling it to be carried out, and, if necessary, enforced before the courts of the country concerned. This distinction is discussed in Part II.

be internationally bound (which may mean that the executive has committed the state in advance and taken the risk of the legislature, or other organ concerned, not giving its "ratification"), or else some further and additional act over and above the constitutional "ratification" is necessary before consent in the international sense can be regarded as having been given. In either case, it is suggested, the giving of such consent is, from the international standpoint, quite separate from and in no way dependent on any constitutional "ratification" which, as a matter of domestic concern, may be required.[1] Thus, in cases where a treaty appears to need no ratification in the international sense, e.g. is expressed to take effect without ratification as from signature or as from a given date, it seems clear that any party signing it purports to be bound as from the date of signature, or as from the date given (unless, indeed, the plenipotentiaries have exceeded their powers in signing a treaty in such terms); and if under the constitutional law of that party the consent of the legislature is necessary, it is clear that the executive must either obtain such consent prior to signing, or seek it afterwards and run the risk of not obtaining it. The important question whether, if in the latter event such consent is not forthcoming, the state as an entity is or is not internationally bound is discussed below in Part V. Similarly, in cases where a treaty requires ratification, whether or not (as is now almost invariably the case) it specifies in terms that instruments of ratification shall be deposited or exchanged, an actual deposit or exchange will be necessary, and will still be necessary as a separate and additional act whether preceding[2] or succeeding any

[1] It may be argued that ratification in the international sense *is* dependent on "ratification" in the constitutional sense inasmuch as in cases where the latter is necessary the former cannot take place without it. Such an argument begs the question, however, for it is only from the constitutional point of view that the international ratification depends on the constitutional. The suggestion made in Part V of this article is that there is no rule of *international* law prescribing that countries under whose constitutions legislative approval is necessary must obtain such approval as a condition of ratifying. Consequently, countries which ratify without obtaining such approval may find themselves as much bound from the international point of view as if they had.

[2] No doubt it is as rare as it would be rash for an executive, needing the approval of its legislature, to lodge an instrument of ratification before obtaining such approval. Probably in most of the countries affected this would not in any event be *constitutionally* possible. In theory the possibility exists, and raises the question (to be considered in Part V) of the binding effect of such a ratification from the international point of view, in the event of the necessary legislative approval being withheld.

The analogous though distinct case of a ratification being given *before* the necessary *legislation* has been passed to enable the treaty actually to be applied and enforced in the courts occurs, unfortunately, less rarely.

constitutional "ratification" which may take place. From the above it seems to follow that "ratification" in the constitutional sense is not an international but a purely domestic act, and that *per se* it has no international force or effect.

It is probably unfortunate that the internal domestic processes whereby the executive is placed in a position to bind the state by a given agreement should have received the name of "ratification", as this often leads to confusion. Thus it is sometimes said that an agreement needs ratification, when in the international sense it does not, and what is meant is that one of the parties cannot, under its own constitution, become engaged until certain purely domestic acts have been carried out. Again, and conversely, it is sometimes loosely said, e.g. that in the United Kingdom treaties do not need ratification, when all that is meant is that in general the treaty-making power is, in the United Kingdom, vested in the Crown, and that the approval of Parliament need not be obtained before a treaty engagement is entered into; but a given treaty may none the less require ratification in the international sense on the part of this country.

II

The internal constitutional process of ratifying or approving a treaty must, it would seem, in its turn be distinguished from the further and theoretically quite distinct process whereby legislation is passed to implement a treaty which could not actually be carried out, or, where need be, enforced in the courts without such legislation. The distinction between the two processes is often lost sight of, on account of the fact that, in countries where the approval of the legislature is necessary before a treaty engagement can be entered into, it is often the practice for the legislature, in giving such approval, at the same time to pass the necessary legislative measures to enable the treaty to be carried out. That the two processes are in fact distinct seems, however, clear from the following considerations.

In countries such as the United Kingdom, where in general the approval of Parliament is not necessary before a treaty engagement is entered into, the executive, if desirous of concluding a treaty which requires no legislation in order to enable it to be carried out,[1] will be in a position at once to sign and ratify the

[1] Whether because the necessary legislation already exists or because nothing in the treaty will be in conflict with existing law, or because the treaty will not involve any question of the application of domestic law or of proceedings before the municipal courts.

treaty, without reference to any other organ of the state. If, however, for any reason the treaty cannot be carried out without altering the existing law or passing additional legislation, it will be necessary for the executive, even in countries where the approval of the legislature is not constitutionally necessary before treaty engagements can be entered into, to request the legislature to pass the necessary provisions. Indirectly, of course, the passing of such legislation presupposes that the legislature in fact approves of the treaty. Nevertheless, from a formal point of view, no actual approval is, in terms, given and the position still remains that such approval is not required and that the passing of the legislation is an act distinct from the giving of any such approval. This seems clear from the fact that the executive could, even in the case of a treaty needing legislation, quite constitutionally proceed to ratify and bind the state before the necessary legislation had been passed. Such an act would, no doubt, be unwise, but in countries such as the United Kingdom no actual infringement of the constitution would thereby be involved. On the other hand, in countries where the approval of the legislature is required before the executive can bind the state by treaty, it is clear that this approval will be necessary, whether the treaty involves the passing of legislation or not, and that the passing of the legislation is a formally distinct act, notwithstanding that for reasons of convenience the approval may sometimes be concurrent with or even left to be inferred from the act of passing legislation.

It is important to distinguish between the two processes since, according to some authorities, the consequences of failing to carry out the one are different from the consequences of failing to carry out the other. It scarcely admits of doubt that a state which, having duly complied with its own constitutional requirements (whether or not these involve obtaining the approval of the legislature), has proceeded to ratify a treaty internationally, is bound thereby, notwithstanding that it has not at the time passed the necessary legislation to enable the treaty to be actually enforced, and that the legislature may subsequently refuse to pass it. In such a case it would seem either that the failure to pass the legislation constitutes in itself a breach of the treaty or, more correctly, that a breach will result from the fact that owing to the absence of the legislation the treaty cannot be implemented. There seems to be little doubt, therefore, that a state cannot plead its own failure to pass the necessary legislation to enable it to carry out an engagement into which it has regularly entered,

as an excuse for not observing the treaty. On the other hand, it is asserted (though, as is indicated in Part V, the correctness of this assertion may be open to doubt) that the failure on the part of a state to comply with its own constitutional requirements as regards obtaining the assent of the appropriate organs before ratifying internationally, results in the state not being bound by the treaty at all, even though international ratification has been given.

III

It is now possible to attempt some answer to the general question "Do treaties need ratification?" together with its corollary "In what circumstances can it be contended that a treaty is invalid for want of ratification?" As regards "ratification" in the constitutional sense, it is evident that the necessity for it depends entirely on the law of the country concerned. Into this question it is not possible to go here.[1] The only point in regard to "ratification" in the constitutional sense which is pertinent to the present inquiry is the question how far such "ratification" where necessary constitutionally is also essential to the *international* validity of the treaty, and this is discussed in Part V.

As regards the necessity for ratification in the international sense, it seems evident that, subject to any overriding general principle of international law to the effect that all treaties require ratification even if they do not say so (as to which see Part IV), this question must depend primarily on the terms of the treaty itself or, more accurately, on the intentions of the parties as evidenced by the treaty or the surrounding circumstances. When a treaty in terms provides for ratification, no question can arise.[2]

[1] A comparative study of the law of all the principal countries on this subject is contained in *Treaty-Making Procedure* by Ralph Arnold (Oxford University Press), which also has a valuable introduction by Dr. Arnold McNair on "Constitutional Limitations on the Treaty-Making Power". The writer of the present article, as will be seen in Part V, ventures, though only with great diffidence, to disagree with certain of Dr. McNair's conclusions. The section of Mr. Ralph Arnold's work dealing with the United Kingdom seems somewhat too brief: a much fuller statement of the constitutional requirements of the United Kingdom as regards the making of treaties was contained in a paper written by Dr. McNair for the International Congress of Comparative Law, 1932, entitled "The Method of the Conclusion of Treaties and other International Engagements by the United Kingdom of Great Britain and Northern Ireland", particularly the section on "The Relation of Treaties to British Municipal Law and to the Legislature".

[2] As has already been observed in note 1, p. 113, where a treaty not only provides for ratification, but also inferentially indicates the particular method of ratification, it is doubtful whether any other form of ratification will suffice to render the treaty binding as such, although other consequences may result from such action.

Equally, it seems scarcely possible to suggest that if a treaty in terms stated that no ratification was necessary,[1] such a provision would not override any general rule of international law (if such there be) to the effect that treaties require ratification (unless indeed the plenipotentiaries had exceeded their powers in signing a treaty in these terms). Similarly it might be possible to infer from the wording of the treaty or from the surrounding circumstances that it was not intended to be ratified even though no actual statement to that effect was made, and such an inference, if sufficiently clear, would also, it is submitted, override any such general rule. An example of this is afforded by the rule that treaties signed personally between Heads of States need no ratification. Various reasons have been given for this rule, but it is submitted that its true basis lies in the fact that, as regards such a treaty, there is an almost irresistible inference, in the absence of any statement or strong presumption to the contrary, that the parties intended to bind themselves by their mere signature. This case is further discussed in Part V. The practice of signing treaties directly between Heads of States has indeed virtually fallen into desuetude, but a modern analogy is to be found in the personal signature of treaties on the part of the permanent heads of governments of what may be called "authoritarian" states, as opposed to states governed under a genuine parliamentary system. An example is afforded by the "protocols" signed at Rome on March 17, 1934, personally by Signor Mussolini on behalf of Italy, Herr Dollfuss on behalf of Austria, and General Gömbös on behalf of Hungary, providing for consultation and economic co-operation. These protocols do not provide that ratification is required; nor do they provide that ratification shall not be required; they do not even provide that they are to come into force on the date of signature—they contain no provision of any kind as to their entry into force. Nevertheless, there arises an irresistible inference[2] both from this very silence, and also from the personality of the signatories and the type of state of whose governments they are the heads, that they intended to bind themselves and their respective states by their mere signatures, and that the agreements came into force as from the moment of signature.

The conclusion to be drawn from the foregoing considerations

[1] This is rare: normally treaties do not go farther in this direction than to make it inferentially clear that no ratification is required, e.g. by providing in terms that the treaty is to come into force on signature.

[2] This inference seems, in fact, to be correct. These protocols have not been ratified, yet are apparently treated as being in force.

seems to be that the question of the existence of any general principle of international law requiring treaties to be ratified only arises in regard to those treaties as to which no inference can be drawn, either from the terms of the treaty itself or from the surrounding circumstances, as to whether or not they require ratification, i.e. as to the intentions of the parties in this respect.

Before considering whether there is any general principle of international law which governs such cases and if so what that principle is, it will be desirable, in order to avoid confusion, to consider a number of cases in which a treaty which does not in terms provide for ratification must nevertheless be held to require it, not, it would seem, because of any such general principle, but because an inference that the parties intended ratification is to be drawn from all the circumstances of the case. The most elementary example, perhaps scarcely an example at all, is that of a treaty which does not contain the usual positive injunction "the present Treaty shall be ratified" or "the present Treaty shall be subject to ratification", but which, without any such express provision, simply states that "the present Treaty shall come into force on the exchange of ratifications which shall be effected at . . . as soon as possible". Here there is a conclusive inference that ratification is intended and no recourse to any general rule is necessary; indeed it is clear that the treaty cannot come into force until ratification is effected. A better example consists of those agreements which effect an amendment or addition to an already existing agreement. If the previous agreement was ratified there is an inference that, in the absence of indication to the contrary, the parties probably intended that the second agreement should also be ratified, and such ratification is normally proceeded to, even if the agreement itself is silent on the subject. Another example occurs in those cases where the full powers of the plenipotentiaries who draw up and sign a treaty, or of any of them, contain a clause the effect of which is that signature alone will not bind the state concerned and that the right to ratify is reserved. In such an event, even if the treaty is silent as to ratification, there will nevertheless be an inference that it was intended to be ratified.[1] Such a clause in full

[1] It is true that the Permanent Court of International Justice has on more than one occasion stated that where the terms of a treaty are clear in themselves, the Court will not have any regard either to preparatory documents or to surrounding circumstances. But the above dictum is probably only applicable to the case of the interpretation of treaties, as to the existence and validity of which, as such, there is no dispute. In the case under consideration here, however, the question before the Court would be whether by reason of the absence of ratification a treaty was

powers is in point of fact very usual, indeed where a formal treaty or convention is being negotiated almost invariable. The position which results where this clause is omitted is discussed in Part V. If, in cases where such a clause exists, the plenipotentiaries were to sign the treaty with a clause in it to the effect that it did not require ratification or that it was to come into force at the moment of signature, they would clearly be exceeding their authority and this provision would not be binding on their governments, who would be entitled to insist that they could only become bound by ratifying.[1] Again it is theoretically possible that during an international conference an understanding might be reached to the effect that any agreement eventually drawn up should be subject to ratification, and that this might be stated in the minutes of the conference, though not in the agreement itself. Here, again, although the agreement were silent, there would be an inference

binding at all, and it is submitted, therefore, that if the treaty did not itself give a clear indication as to whether ratification was required or not, the Court would not be able to refuse to take into consideration any documents or circumstances which might throw light on the intention of the parties in this connexion.

[1] A somewhat similar case, but one which is not strictly speaking relevant to the question of ratification, occurs when government officials, or ministers, proceed to sign agreements without having received any authority or full power to do so from their governments or Heads of States. It is here obvious that an agreement so entered into cannot be binding on the state or states concerned without something further being done. That something further may consist in the fact that the government concerned, on receiving information of what has occurred, does not demur, and in fact proceeds to act on the agreement or allow it to be acted upon by the other party without protest. In such cases it must probably be held that the state concerned is estopped from alleging that the individual who effected the signature was not authorized to do so, and its position will, therefore, be the same as if the signature had been effected under a full power in proper form. The further question of the necessity, if any, for ratification will then, of course, depend on the general principles discussed in this article. Alternatively, the state may at once proceed to effect an express ratification, in which case there can be no doubt that it has adopted the act of its official and is, subject to the topic discussed in Part V, bound by the treaty. This case, however, really falls outside the present discussion, for the reason that the ratification of a treaty presupposes that there is already in existence a treaty to be ratified. Where, however, a treaty is signed by officials or other persons who are acting without authority, their action does not strictly speaking bring any treaty into existence, but only a document of a purely personal character. In regard to such a document, therefore, no inference of any kind can arise as to the necessity for ratification. The document in fact only becomes a treaty when the action of the individuals concerned in signing it has by one means or another been adopted and confirmed by their governments. Only then is it possible to look at the treaty and the surrounding circumstances to see whether the further act of ratification is or is not required. No doubt in those cases where a state proceeds by an express ratification to adopt the act of its official it can be considered as having also thereby effected any international ratification which may be necessary. In other words the ratification operates both as an adoption of the official's act, so as to bring the treaty *qua* treaty into existence, and as a formal (international) ratification of the treaty.

that the parties intended ratification. There are, no doubt, other examples of the same kind. The distinctive feature of all of them seems to be that the necessity for ratification despite the silence of the treaty depends not on any general principle of law but upon an inference as to the intention of the parties to be drawn from all the circumstances of the case.[1]

IV

Those cases must now be considered in which no inferences as to the intention of the parties can be drawn either from the terms of the document or from the surrounding circumstances. The question arises whether there is any general rule of international law that all treaties need ratification with the exception of those as to which there is some definite indication that ratification is not intended. The answer which, it is suggested, seems most in accordance with the actual practice of states is to the effect that there is no such rule; that only those treaties need ratification which say so in terms, or as to which an inference of an intention that there should be ratification can be drawn; and that in regard to all other treaties it can be assumed that they are not intended to be ratified and, in the absence of indication to the contrary, are intended to come into force at the moment of signature. This is the view to which the older authorities[2] were inclined and it was expressed by Phillimore in the following passage:[3]

"... it should be observed, that though it is now usual to reserve the final settlement of a Treaty negotiated by ambassadors for the *Ratification* of the Governments whom they represent, yet that if the negotiator be a Plenipotentiary, such Ratification cannot be held essential to the validity of the Treaty, unless the necessity for it has been expressly reserved in the powers given to the ambassador, or unless, as usually happens, it be the subject of stipulation in the Treaty itself."

The weight of modern authority, however, is on the other side. Thus Halleck:[4]

"The question how far, under the positive law of nations, ratification by the State in whose name the treaty is made, by its duly authorized minister or diplomatic agent, furnished with full power, is essential to the validity of the treaty, was at one time the subject of much doubt and discussion. But it is now the settled usage to require such ratification, even where this pre-requisite is not reserved by the express terms of the treaty itself."

[1] See note 1 on p. 120.

[2] Gentilis, Bk. III, Cap. XIV; Grotius, Bk. II, Cap. XI, § 12; Pufendorf, Bk. III Cap. IX, § 2; Vattel, Bk. II, Cap. XII, § 156.

[3] II, § lii.

[4] II, Ch. VIII, § 12

Oppenheim[1] states that:

"The institution of ratification [is] a necessity for international law";

and again:

"It is now a universally recognized customary rule of international law that treaties regularly require ratification, even if this is not expressly stipulated."

Hall[2] also takes the same view:

"Except when an international contract is personally concluded by a sovereign or other person exercising the sole treaty-making power in a state, or when it is made in virtue of the power incidental to an official station, and within the limits of that power, tacit or express ratification by the supreme treaty-making power of the state is necessary to its validity. . . .

"Express ratification, in the absence of special agreement to the contrary, has become requisite by usage whenever a treaty is concluded by negotiators accredited for the purpose. The older writers upon international law held indeed that treaties, like contracts made between individuals through duly authorized agents, are binding within the limits of the powers openly given by the parties negotiating to their representatives, and that consequently where these powers are full the state is bound by whatever agreement may be made in its behalf. But it was always seen by statesmen that the analogy is little more than nominal between contracts made by an agent for an individual and treaties dealing with the complex and momentous interests of a state, and that it was impossible to run the risk of the injury which might be brought upon a nation through the mistake or negligence of a plenipotentiary. It accordingly was a custom, which was recognized by Bynkershoek as forming an established usage in the early part of the eighteenth century, to look upon ratification by the sovereign as requisite to give validity to treaties concluded by a plenipotentiary; so that full powers were read as giving a general power of negotiating subject to such instructions as might be received from time to time, and of concluding agreements subject to the ultimate decision of the sovereign. Later writers may declare that by the law of nature the acts of an agent bind his state so long as he has not exceeded his public commission, but they are obliged to add that the necessity of ratification is recognized by the positive law of nations."

Similarly Crandall:[3]

"By the early writers on international law, living at a time when the theory of personal sovereignty generally obtained, and the negotiator was the immediate agent of the sovereign, the rule of the Roman law, that the principal is bound by the agent acting within his powers, was applied to treaty negotiations. The advantages of entrusting full and general powers to the negotiators, and the importance of the trust, have led recent writers quite generally to admit the right of ratification, even if no express reservation be made in the treaty or full powers. A reservation of this right is now by the practice of nations to be read into the full powers of the negotiator."

The same opinion is expressed by Fauchille,[4] who goes into the

[1] Oppenheim, 4th ed., Vol. I, §§ 511–12.
[2] Hall, 8th ed., § 110.
[3] *Treaties, Their Making and Enforcement*, 2nd ed., § 3.
[4] See generally § 824.

question at length, citing a number of other authorities in support, amongst others, Heffter, von Holtzendorf, Fiore, Calvo, Rivier, Nys, von Liszt, and Westlake. Besides Phillimore, only Klüber, de Martens, Bluntschli and Merignhac, among modern writers, appear to take a contrary view.

It will be seen, therefore, that the weight of authority is in favour of the view that even if a treaty is completely silent on the subject, the necessity for ratification is nevertheless to be read into it or at any rate exists as a general principle of law. As a consequence (see the foregoing quotations) it is also held by those publicists who are of this opinion that in all cases where the full powers of plenipotentiaries do not expressly reserve the right of ratification, such a reservation is to be read into the full powers.

Great weight must of course necessarily attach to the opinion expressed by so many eminent jurists, but there are, nevertheless, several considerations in the light of which it may be permitted to doubt whether this view is any longer consistent with modern practice. The first is the almost invariable and, now, long-standing practice of states of specifically providing for ratification in all those international engagements which they intend shall be ratified. It may be asked why, if the view expressed by the majority of publicists is correct, any such stipulation should be necessary. If the rule is as stated, it would seem that treaties might well be silent on the subject, leaving ratification to the operation of the rule, it being understood that the treaty would not come into force until ratification, and further would, in the absence of indication to the contrary, come into force immediately upon the completion of the necessary ratifications. At any rate one would scarcely expect to find an almost invariable practice of specifically providing for ratification. It seems difficult, therefore, to resist the conclusion that in all those cases where governments attach importance to ratification (whether for its own sake or because their own constitutions do not allow them to become bound until the treaty has been approved by their legislatures) they are not content to leave the matter to be governed by any general principle of law, and prefer to safeguard their position specifically by a definite provision in the treaty. This seems to show that in the actual practice of states (which of course is the only true basis for a general rule of international law) the alleged rule is not considered sufficiently definite or universally admitted to afford an adequate safeguard. In other words, states do not appear to treat the alleged rule as being a definite rule at all; on the contrary, they

seem to act as if there were no definite rule on the subject, or rather as if the rule were the exact contrary, so that, in the absence of some express stipulation or definite inference, it would, or might, be doubtful whether ratification was necessary.

The same conclusion may also be drawn from the almost invariable practice of states, in all those cases where ratification is intended, of inserting in the full powers given to their plenipotentiaries an express reservation of the right to ratify. It may be, of course, and doubtless is the fact, that in many cases this right is thus expressly reserved by governments in order to make sure of safeguarding their own constitutional positions, under which the approval of their legislatures may be necessary. Nevertheless, if the alleged rule under discussion is so definite that, even in those cases where no express reservation is made in the full powers, such a reservation is (as stated in some of the passages above quoted) to be read into them, the practice of making such a reservation should be unnecessary. Here, again, states seem to act as if the rule did not exist and as if in all those cases where the right to ratify was not expressly reserved it might be possible to take the view that the plenipotentiaries were empowered to conclude a treaty not requiring ratification.

It is, no doubt, possible to challenge these conclusions on the ground suggested by Lord Stowell in his judgment in the *Eliza Ann* (1813 1 Dods. at p. 248) where he stated that

> "According to the practice now prevailing, a subsequent ratification is essentially necessary, and a strong confirmation of the truth of this position is that there is hardly a modern treaty in which it is not expressly so stipulated; and therefore it is now to be presumed that the powers of plenipotentiaries are limited by the condition of a subsequent ratification."

With the greatest respect to so eminent an authority, however, it would seem that, according to ordinary principles of jurisprudence, the fact that something is expressly stipulated for is evidence not that it is already the rule but rather that it is not the rule, or at any rate that no general rule of law can be relied on in the matter. If parties go to the trouble of expressly providing for or reserving something, there is a presumption that but for such provision or reservation they would have no right to it, and if the practice is sufficiently widespread and long continued, this presumption tends to become conclusive. Where nine treaties out of ten contain a clause providing for ratification, the natural assumption in regard to the tenth is that no ratification is required.

The practice of the United Kingdom in regard to the terms of

full powers is especially interesting. Whereas most countries make an unqualified reservation to the effect that the plenipotentiary has the power to sign only "subject to ratification", the phrase used in United Kingdom full powers is "subject *if necessary* to ratification".[1] In the case of a country according to whose constitution certain international agreements require "ratification" in the constitutional sense and others not, the words "if necessary" might be held to relate to the necessity or otherwise of such "ratification", although strictly speaking it seems unnecessary to make mention of "ratification" in the constitutional sense in a full power. In the case of the United Kingdom, however, where, with the possible (though by no means certain) exception of treaties involving a cession of territory, no international engagement needs the sanction, as such, of the legislature, it seems likely that the words "if necessary" must relate to the necessity or otherwise of international ratification according to the terms of the treaty itself or according to the inference to be drawn from collateral documents or surrounding circumstances. In other words, the United Kingdom form of full powers appears to leave it an open question whether ratification is or is not necessary, and seems to confer on the plenipotentiaries the power, unless their instructions are to the contrary, to negotiate a treaty which does not require ratification.

Another consideration which may throw doubt on the alleged rule as to the necessity for ratification is the fact already noticed that treaties signed between Heads of States in person, or in certain cases between heads of governments, do not require ratification. It is not altogether easy to find a satisfactory basis for this exception to the alleged general rule except on the assumption that the rule is not as it is stated to be and that, if there is any general rule, it is rather to the effect that the necessity or otherwise for ratification depends on the intentions of the parties. The *rationale* of ratification is stated by Oppenheim[2] to be as follows:

> "Its *rationale* is partly that States want to have an opportunity of re-examining, not the single stipulations, but the whole effect of the treaty upon their interests. These interests may be of various kinds. They may undergo a change immediately after the signing of the treaty by the representatives. They may appear to public opinion in a different light from that in which they appear to the Governments, so that the latter want to reconsider the matter."

Yet it seems evident that the above considerations apply equally to those cases in which Heads of States or governments have

[1] For forms of United Kingdom and other full powers, see Satow, *Guide to Diplomatic Practice*, 3rd ed., pp. 79–86.

[2] *Op. cit.*, § 511.

themselves signed a treaty. It would seem, therefore, that if the rule is indeed that treaties require ratification as a species of inherent necessity, there are no sufficient grounds for making the above exception. If, on the other hand, the position is that ratification depends on the intentions of the parties, then the above case falls into its proper place as one in which it may be inferred that there was an intention that the treaty should be binding by the act of signature. This view is supported by the fact that the above exception is held not to operate in those cases where, although the treaty is signed by the Head of a State in person, yet under the constitution of that state the approval of the legislature is required. In such a case the inference of an intention to become bound by the act of signature would be negatived.

Finally, there is the fact that amongst the admitted exceptions to the alleged rule as to the necessity for ratification is one to the effect that certain kinds of international engagements, concluded in certain forms, do *not* require ratification. For instance, Oppenheim[1] states:

"Thus a protocol, or an exchange of notes, which merely add some minor point, or record agreement on the interpretation of a clause in a treaty, do not require ratification, unless this is specially stipulated. The same is valid for agreements providing for a *modus vivendi* and the like, whatever title they may bear. Further, there is no doubt that matters of minor importance are frequently agreed upon by an exchange of notes, or in so-called protocols, arrangements, declarations, and the like, which are not considered to be subject to ratification, because the agreements therein contained are at once carried out."

There is, in fact, no doubt that, according to the practice of states, agreements cast into the form of an exchange of notes are, normally, not ratified, and that they come into force either on the actual date of the exchange, or perhaps on the date of the last note of the series, or on a date agreed upon and indicated in the notes themselves, as the parties may desire. Yet it would seem that there is not any sufficient ground for distinguishing between agreements cast into the one form and those cast into the other, so far as their legal validity and efficacy is concerned. This is admitted by Oppenheim,[2] who states:

"It is asserted that 'apart from those compacts which bear the title *treaty* or *convention*, ratification is only required where it is provided for'; but this assertion is too sweeping. Since *all* international compacts are contracts, and therefore treaties in the wider sense of the term, the title which a particular compact bears cannot decide the question whether it does, or does not, require ratification. The decision rather depends upon the contents of the compact."

[1] *Op. cit.*, §§ 512–13. [2] *Ibid.*

The assumption implicit in the views of Oppenheim and other jurists on this subject appears to be that an exchange of notes usually deals with matters of smaller importance than those dealt with in treaties or conventions proper. This is held to be a sufficient justification for the fact that one class of engagement may require ratification and the other not. Seeing, however, that an exchange of notes, even if it only deals with a matter of minor importance, is, once it is properly and finally concluded, of just as great legal validity and efficacy as a treaty proper, i.e. that there is no difference in the *legal* character or effect of the two classes of instruments, it is suggested that there is no logical basis for distinguishing between them as regards the necessity for ratification; in other words, if the position is, as is alleged, that international engagements require ratification as a species of inherent necessity before they can be valid or binding, then this rule should logically apply to *all* international engagements, whatever their particular form, seeing that no distinction would seem to be possible as to their legal nature or effect, once they are finally concluded. The mere fact that the two types of agreement may, from the general or political point of view, deal with matters of differing importance seems, strictly speaking, not to be relevant. Even if the matter could properly be made to depend on the content of the agreement, it is the fact that at the present time it can scarcely any longer be said that an exchange of notes habitually deals with matters of smaller importance than do treaties and conventions. It may be true that exchanges of notes are normally confined to matters of a technical or economic rather than of a political character; but agreements of a technical and economic character are to-day often as important as, and may have more far-reaching consequences than, those of a political character. Important agreements are now quite often embodied in the form of an exchange of notes, and this practice is in certain cases favoured by states according to whose constitutions legislative approval is necessary for all treaties and conventions proper.[1] At any rate it would seem that if it is possible to make a formal distinction between treaties and exchanges of notes in the matter of ratification, then governments, by means of a large extension of the practice of concluding agreements in the form of an exchange of notes, could to a very great extent avoid and

[1] In the United States, for instance, what is there known as an "executive agreement" does not require the "ratification" of the Senate, and can be made by the executive acting on its own authority. Such agreements are usually cast in the form of an exchange of notes.

gradually render obsolete any rule to the effect that international agreements require ratification. This theoretical possibility tends to support the view that the necessity for ratification is not inherent and depends in the last resort, not on any general rule, but on the intention of the parties; and that where no intention to ratify is apparent it may be assumed that none exists.

In view of the foregoing considerations, it is submitted that the rational and convenient rule, and the one which is in fact consistent with the actual practice of states, is to the effect that a treaty does not require ratification in the international sense of the term unless it says so expressly, or unless an inference to that effect is to be drawn either from the terms of the treaty, the preparatory documents, or the surrounding circumstances. As a corollary, the rule would also be that in all those cases where the right to ratify is not expressly reserved in the full powers, plenipotentiaries must be deemed to have the power to negotiate a treaty which shall not be subject to ratification in the international sense: there would be nothing to prevent the government concerned from nevertheless obtaining any "ratification" which might be required under its own constitution, but in such a case a reservation would presumably be made in the full powers, or at any rate the plenipotentiaries would insist on the inclusion of a ratification clause in the treaty. The situation which would arise if they failed to do so, and their government also failed to obtain the necessary constitutional "ratification" now falls to be discussed.

V

Having attempted some answer to the question whether treaties need ratification, it is now necessary to try to answer the corollary question as to what are the circumstances in which it can be contended that a treaty is invalid for want of ratification. It is obvious that in any case in which, according to the principles discussed in the preceding section, a treaty requires ratification in the international sense, the treaty will not be binding unless such ratification is made. It has, moreover, been observed[1] that, in those cases in which some special method of ratification is indicated, it is doubtful whether any other method will suffice to render a treaty binding as such, although certain other consequences may result from a purported ratification in a different form.

The only question which remains, therefore, is whether it can ever be contended that the failure on the part of a state to obtain

[1] *Supra*, p. 113, n. 1.

legislative approval for a treaty, i.e. to obtain "ratification" in the constitutional sense, where this is necessary under its own law can operate to make the treaty not binding internationally, even though that state has purported to do everything that is necessary by way of signature and ratification in the international sense to render the treaty binding. It is suggested that this question ought to be answered definitely in the negative; that ratification in the international and in the constitutional sense should be considered as two entirely distinct things; and that, except in those cases where a treaty itself expressly provides that its entry into force is dependent on municipal "ratification" or legislation,[1] the failure to "ratify" in the constitutional sense ought not to have any bearing or effect on the international validity of a treaty, the latter being dependent wholly on the international and not on the constitutional acts of the states concerned. Apart from the exception just noticed, a state which, acting *qua* state, purports to do everything that is necessary from the international point of view in order to bind itself by a treaty should be held to have become duly bound, and ought not subsequently to be able to plead its own failure to satisfy its constitutional requirements as a sufficient reason for not being bound.

There is, however, authority against this view. Thus Hyde[2] considers that:

"An independent State is deemed to possess the broadest right to enter into international agreements. Its constitution may, however, in various ways limit and regulate the exercise of the right, restricting the conclusion of treaties designed to effect certain objects, or prescribing the method by which the State shall give its consent to certain classes of engagements. An unconstitutional treaty must be regarded as void. The nature and extent of the limitations which the document setting forth the fundamental law of the State has imposed, become, therefore, matters of concern to all foreign powers with which it may have occasion to contract."

Similarly in Dana's Wheaton[3] it is stated:

"Where, indeed, such auxiliary legislation becomes necessary, in consequence of some limitation upon the treaty-making power, expressed in the fundamental laws of the State, or necessarily implied from the distribution of its constitutional powers,—such for example as a prohibition of alienating the national domain,—then the treaty may be considered as imperfect in its obligation, until the national assent has been given in the forms required by the municipal constitution."

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[1] See concluding paragraph of this article.

[2] *International Law*, Vol. II, § 494.

[3] § 266.

A similar view is put forward with much force by Dr. A. D. McNair in his introduction to Mr. Ralph Arnold's *Treaty-making Procedure*.[1] The view taken by Dr. McNair is that where it is a matter of international notoriety that the provisions of a given constitution are to the effect that treaties can only be concluded with the approval of certain organs of the state, then other states cannot hold the state concerned bound by a treaty if in fact there has been no compliance with the provisions in question. Dr. McNair, however, suggests a distinction in this respect between those states whose constitutions are in regard to this matter notorious, e.g. the United States, and those, e.g. the United Kingdom, where the provisions of the constitution, if not obscure, are at any rate unwritten and probably difficult of ascertainment, at least for a foreigner. In regard to the former Dr. McNair suggests that other states must be deemed as it were to have notice of the relevant provisions, whereas in regard to the latter, no such notice exists. This distinction, which in practice involves classifying states according to whether they have written or unwritten constitutions, is, as Dr. McNair observes, somewhat hard to defend. In the opinion of the present writer the fact that it seems necessary, as a matter of practice, to draw this distinction tends to show that the theory as a whole is not without weakness.

It seems clear that the theoretical basis for any rule to the effect that failure to obtain constitutional "ratification" invalidates any international signature or ratification which may be given, must be that the executive, in attempting to bind the state in such circumstances, exceeds its authority and acts *ultra vires*, so that its act is null and void and incapable of binding the state as a whole. The inconveniences of this theory when applied to the relations between states are discussed below; but, on the assumption that it is sound, it ought to hold good as well for states whose constitutions are obscure as for those whose constitutions are well known, and there scarcely appears to be any sufficient *theoretical* ground for making a distinction between the two cases.

Not only are there theoretical objections to drawing this distinction, but it is also a matter of practical difficulty to distinguish between written and unwritten constitutions in this matter. It is probably the case that some written constitutions are in certain respects scarcely less difficult to interpret than if they were unwritten, having been so glossed upon by subsequent governmental

[1] *Supra*, p. 118, n. 1. A study of this introduction will be found of the greatest utility in regard to this difficult subject.

decrees or interpretations of the courts that it may in many cases be a matter of real difficulty to ascertain precisely what the true position is. The majority of countries at the present time have written constitutions; consequently, except in the case of a very few, such as that of the United States, the provisions of which really *are* a matter of international notoriety, it would seem that if the rule is as stated, namely that in the case of written constitutions states must be held to have notice of the provisions thereof, no state would ever be safe in accepting the apparently valid (international) ratification of a treaty on the part of another state without first making careful inquiry both as to the constitutional requirements of that state and whether those requirements had in fact been complied with.

The difficulties attendant upon obtaining this information are discussed below. Even if, however, the attempt to draw a distinction between written and unwritten constitutions, as such, be given up, and a test based on notoriety or the lack of it be adopted, the above-mentioned theoretical objections to drawing any distinction at all still remain. Nor are the practical difficulties disposed of, for cases would surely arise in which it would be a debatable question whether the provisions of a given constitution were of a sufficiently notorious character or not. A state which had purported to ratify an international engagement without obtaining the necessary consents required by its constitution, and which afterwards argued that its purported ratification was for this reason of no effect, might be taken before an international court on this point by the other party concerned. In such a case the decision of the court would apparently turn on whether or not the constitutional provisions in question were of sufficient notoriety, or at any rate whether the other state concerned must in all the circumstances be held to have notice of them. This would surely, in many cases, be a very difficult question for a court to decide, and there would probably be cases in which no satisfactory decision could be arrived at.

These considerations all seem to point to the conclusions (*a*) that it is difficult to find a satisfactory basis for distinguishing in this matter between one class of state and another, and (*b*) that the more satisfactory rule would be to the effect that, subject to the point discussed in the concluding paragraph of this article, no state which has purported to become bound by an international engagement, through the due performance of all that is necessary from the international point of view to achieve that object, ought

to be permitted to deny the validity of its own action by pleading a failure to observe its own constitutional requirements.

Various other considerations seem to support this view. In the first place, however "written" or notorious in fact the provisions of a given constitution may be, it is dubious whether as a matter of law one state can ever be regarded as having *official* knowledge of the law or constitution of another state unless it requests that knowledge officially and receives an official reply. Evidence that this is so is to be found in the quasi-universal practice of states and of their courts, when they require knowledge of the law of a foreign country, of specifically asking for the necessary information through official channels, or at any rate of hearing expert evidence on the subject (this last is practically confined to British courts; most foreign courts, like governments, seek the necessary information officially). Another way of putting the point is to say that states cannot be presumed to know each other's laws. It is true that all individual citizens are presumed to know the law, and that ignorance of it is not a legal excuse for failure to comply with it. This, however, is because all the citizens in question live under and are ruled by the same system of law. No one, however, is presumed to know the law of a foreign country unless he is within or subject to its jurisdiction. Similarly, all states are presumed to know international law, which is the common law regulating their relations, and alleged ignorance of international law does not excuse a breach of it. But it is less easy to see how a state can be presumed to know the law or constitution of a foreign country, and, as has been observed, the practice of states and of their courts is hardly consistent with such a doctrine. If this view is sound it seems to follow that unless a state has officially asked for and received information as to the law or constitution of a foreign country, it ought not to be regarded as officially possessed of such information.

These considerations, if sound, evidently lead to grave difficulties in the operation of any rule whereby states may be regarded as being entitled to plead failure to comply with their own constitutional requirements as an excuse for breaking, or for stating that they are not bound by, an international engagement into which they have purported regularly to enter. Suppose, to take an example, that country A has some reason to believe, but no certain or definite knowledge, that country B is not entitled to bind itself by treaty, or by a certain kind of treaty, without obtaining the consent of its legislature, and therefore proceeds, either before the

engagement takes effect, or after country B has purported to bind itself, to make official inquiries whether the relevant constitutional provisions have been complied with. It is evident that country A must address its inquiries to the executive of country B. There can be no direct communication between the *executive* of one country and the *legislature* of another. In other words, country A is not in a position to make inquiry of or receive a reply from that organ of country B which is most intimately involved. Country A must make its inquiry through the executive of country B, and moreover must rely on the reply which it receives from that executive, since there is no other channel through which an official reply can come. Even if country A has reason to suspect that the constitutional provisions in question have not been or will not be complied with, it has no alternative but to accept whatever reply is made by the executive of country B. Consequently, the very organ of the state which, *ex hypothesi*, is or may be the delinquent, is the only organ which can give an official reply on the subject, and is the organ whose reply must be accepted as good. This, however, seems to be an argument in a circle.

As already mentioned, the theoretical basis for the alleged rule that states are entitled to plead failure to comply with their own constitutional requirements in order to free themselves from their apparent international obligations, is that if the constitution of a given state provides that the consent of the legislature is necessary before a treaty can be entered into, then, if the executive nevertheless purports to make a treaty without obtaining such consent, its act is *ultra vires* and null and void, in exactly the same way that the action of the directors of a company in excess of the powers of the company, as set forth in its articles and memorandum, is null and void, and not binding on the company. This analogy, however, is incomplete as regards the following point. It is true that a company can only act through its directors, just as a state can, in the international sphere, only act through its executive. Nevertheless, if the directors of a company act in a manner which is in excess of the powers of the company in such a way as to injure or prejudice other persons, although their actions are not binding on the company, they can in certain instances, especially in cases involving what amounts to fraud or sharp practice, be proceeded against personally. There is, however, no method by which the executive of a foreign country, or the individual members thereof, can be proceeded against in the international sphere, separately and independently from the state as a whole. In the

international sphere the state is the executive, and the executive is the state, and what the executive does has to be regarded as the action of the whole state and should bind the state as a whole.

It is submitted, therefore, that states must, in their intercourse with one another, be able to rely absolutely on the validity of the actions of, and the information given by one another's executives, those being the only channels through which such actions can be performed or such information given. An intolerable situation would, it seems, be created if states were forced to make minute and often invidious inquiries before they could feel certain of their position; if, even after making such inquiries they could still often not be sure of how they stood; and if, further, it were at any time open to states, after apparently becoming regularly bound by the provisions of a treaty and possibly acting thereon and causing other states to change their position, thereafter to allege that they had never become bound at all on account of their own failure to obtain the necessary legislative consents.

It is true, of course, that in practice a sort of half-way house might be found by the application of a rule based on the principle of implied warranty of authority. On this basis a state which had failed to comply with its constitutional requirements in ratifying a treaty, while not actually bound by the treaty, might become liable in *damages* as having held itself out as being in a position to become a consenting party when in fact it was not, and as having thereby caused other states to change their position to their detriment. This half-way position would, however, also in a sense be illogical, because the basis of the rule, if such there be, that states may plead failure to comply with their constitutional requirements in order to free themselves from their apparent international obligations is that the executive having exceeded its authority, its action cannot bind the state. In other words, the state as a whole is, in effect, entitled to disown the action of its executive. The half-way rule referred to above, however, would suggest that the state was at fault inasmuch as it was responsible for its executive having pretended that there was authority when there was not. Here, again, the analogy with private law seems to break down. An individual who holds himself out as having authority when he has not can be sued personally; his supposed principal is not liable. If, however, a state is to be liable, on the implied warranty of authority basis, it is the state itself, if anybody (i.e. the principal), which is liable; the agent, the executive, having no international existence as such, can have no liability

fastened upon it from the international point of view, except as part and parcel of the state as a whole. Thus, while the rule under discussion presupposes that the state does not incur any adverse consequences from the wrongful action of its executive, the half-way position involves that such consequences are or may be incurred.

On the whole, therefore, it is submitted that the only rule which is both logical and readily applicable from the practical point of view is to the effect that states have no concern whatsoever with, and cannot as a general proposition be held to have any knowledge of each other's laws or constitutions; that a state which purports to become regularly bound by an international engagement, by giving its international ratification thereto, or otherwise, must be presumed to have complied with all necessary internal constitutional requirements, and that other states are entitled to assume that this is so. If it afterwards turns out that such requirements have not in fact been complied with, the state must nevertheless be regarded as being internationally bound and cannot plead the failure in question as absolving it from its obligations: any state whose executive has placed it in this position must seek its remedy by proceeding internally against the executive in question or its individual members, and externally by denouncing the treaty at the earliest possible moment: but it cannot plead that the treaty is void *ab initio*. The position would in this way be assimilated to that which almost certainly exists in the case of states which, having ratified a treaty internationally, if necessary after obtaining the consent of their legislatures, have none the less failed or thereafter fail to pass such amendments to their laws as are necessary to enable them to give effect to the treaty.

An apparent exception to this suggested rule would consist in those cases, the occurrence of which at the present time is not infrequent, where states indicate in the treaty itself that it shall not be binding until the necessary municipal consents have been obtained, or until certain legislation has been passed. There are various reasons for the insertion of such a clause, which need not be discussed here. It is, however, evident that where it exists the parties must be considered as having official notice that certain consents or legislation will be necessary. Sometimes the clause is inserted at the instance of a state which desires specifically to avert the possibility of the other party afterwards pleading failure to comply with constitutional requirements. Even where this clause exists, however, it is submitted that the definite intimation that the

necessary consents had been obtained or legislation passed would have to be regarded as conclusive and binding, and that if the state concerned proceeded to ratify the convention internationally this should be regarded as amounting to an implied assurance that all necessary constitutional or legislative requirements had been fulfilled.[1]

[1] It would be interesting to discuss at greater length than the scope of the present article has permitted the position which arises when a state fails to pass the necessary municipal legislation to *implement* a treaty which has been duly and regularly concluded. There are also various analogous questions, the discussion of which would be interesting; for instance, the exact extent to which a state is entitled to argue that a plenipotentiary who apparently had power to negotiate and sign a treaty in fact had no such power, or exceeded his authority. Here, it may briefly be suggested that, provided the breach of authority can clearly be shown, the state is entitled to repudiate his action, unless the state can be regarded as having been responsible for or as having connived at the breach, or unless it has subsequently adopted the treaty either expressly or by acting thereon. A state which has for years behaved as if a treaty was in force cannot, it would seem, afterwards repudiate it on the ground that the person who negotiated it exceeded his authority. Another similar question is that which arises when the central government of a federation, having the conduct of international affairs, purports to bind the federation as a whole; to what extent can it afterwards seek to justify a breach of the treaty by saying that the law of one of the states of the federation had not been brought into conformity with the treaty and that it (i.e. the central government) has no constitutional power to compel that state to take the necessary measures? Applying the principles suggested in this article, the rule here should surely be that the central government of a federation ought in no case to ratify an international treaty unless and until the necessary legislation to implement it has been passed in *all* the states of the union, or at any rate unless the central government has a positive assurance, on which it can rely, that such legislation will be passed; and further that failure to pass such legislation and the inability of the central government to compel its passage cannot operate to absolve the state as a whole from any breach of the treaty which may result from this failure. It is difficult to see how international relations can be carried on with any confidence except upon such bases as those suggested above. On any other basis states would always be at the mercy of negligence or sharp practice on the part of other states, and, moreover, could never feel certain of the legal validity of obligations apparently regularly entered into.

MEMBERS OF THE LEAGUE OF NATIONS AND SIGNATORIES OF THE PACT OF PARIS

It may be useful to students of international law to have at hand lists of the states members of the League of Nations and signatory of or adherent to the Pact of Paris. It is hoped to repeat these lists, duly brought up to date, in subsequent issues.

Membership of the League of Nations

(April 1934).

Name of Member	*Date of Commencement of Membership.*
Abyssinia	28 Sept. 1923
Albania	16 Dec. 1920
Argentina	18 July 1919
Australia	10 Jan. 1920
Austria	16 Dec. 1920
Belgium	10 Jan. 1920
Bolivia	10 Jan. 1920
Bulgaria	16 Dec. 1920
Canada	10 Jan. 1920
Chile	4 Dec. 1919
China	16 July 1920
Colombia	16 Feb. 1920
Cuba	8 Mar. 1920
Czechoslovakia	10 Jan. 1920
Denmark	8 Mar. 1920
Dominican Republic	29 Sept. 1924
Estonia	22 Sept. 1921
Finland	16 Dec. 1920
France	10 Jan. 1920
*Germany	8 Sept. 1926
Greece	30 Mar. 1920
Guatemala	10 Jan. 1920
Haiti	30 June 1920
Honduras	3 Nov. 1920
Hungary	18 Sept. 1922
India	10 Jan. 1920
Iraq	3 Oct. 1932
Irish Free State	10 Sept. 1923
Italy	10 Jan. 1920
*Japan	10 Jan. 1920
Latvia	22 Sept. 1921
Liberia	30 June 1920
Lithuania	22 Sept. 1921
Luxemburg	16 Dec. 1920
Mexico	12 Sept. 1931
Netherlands	9 Mar. 1920
New Zealand	10 Jan. 1920
Nicaragua	3 Nov. 1920
Norway	5 Mar. 1920
Panama	9 Jan. 1920
Paraguay	26 Dec. 1919
Persia	21 Nov. 1919
Peru	10 Jan. 1920
Poland	10 Jan. 1920
Portugal	8 Apr. 1920
Roumania	8 Apr. 1920
El Salvador	10 Mar. 1924
Siam	10 Jan. 1920
South Africa	10 Jan. 1920
Spain	10 Jan. 1920
Sweden	9 Mar. 1920
Switzerland	8 Mar. 1920
Turkey	18 July 1932
United Kingdom	10 Jan. 1920
Uruguay	10 Jan. 1920
Venezuela	3 Mar. 1920
Yugoslavia	10 Feb. 1920

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* Japan on March 27, 1933, and Germany on October 14, 1933, gave notice of withdrawal.

The following states are not members of the League: The United States, U.S.S.R. (Russia), Afghanistan, Brazil (withdrew in 1928), Costa Rica (withdrew in 1926), Ecuador, Egypt, Saudi Arabia, and other Arab states.

States signatory of or adherent to the Pact of Paris, April 1934

The fifteen original signatories were: Australia, Belgium, Canada, Czechoslovakia, France, Germany, Great Britain, India, Irish Free State, Italy, Japan, New Zealand, Poland, South Africa, The United States.

By the end of 1933, forty-seven other states had adhered: Abyssinia, Afghanistan, Albania, Austria, Bulgaria, Chile, China, Colombia, Costa Rica, Cuba, Danzig, Denmark, Dominican Republic, Ecuador, Egypt, Estonia, Finland, Greece, Guatemala, Haiti, Honduras, Hungary, Iceland, Iraq, Latvia, Liberia, Lithuania, Luxemburg, Mexico, Netherlands, Nicaragua, Norway, Panama, Paraguay, Persia, Peru, Portugal, Roumania, Saudi Arabia, Siam, Spain, Sweden, Switzerland, Turkey, U.S.S.R. (Russia), Venezuela, and Yugoslavia. (Of these Danzig and Iraq were not originally invited to adhere.)

L'INSTITUT DE DROIT INTERNATIONAL

International Law Prizes.

THE Secretary-General of the Institut de Droit International makes the following announcement regarding prizes instituted by Dr. J. Brown Scott under the auspices of the Institut:

L'Institut de Droit International a décerné le prix John Westlake institué par M. J. Brown Scott à M. le Dr. Anton Roth, de Gross-Auheim s/Main (Allemagne), auteur d'un mémoire répondant à la question suivante: 'On demande une étude sur les règles applicables, en cas de responsabilité internationale, à l'évaluation de dommages causés à des particuliers sur le territoire d'un Etat étranger. La question doit être envisagée en tenant compte principalement de la pratique internationale et des décisions des juridictions internationales.'

La question mise au concours pour l'attribution du prix Andres Bello, à décerner éventuellement en 1935, est libellée comme suit:

'Faire un exposé critique des diverses conceptions du déni de justice envisagé comme base d'une réclamation internationale.'

Il est rappelé que, conformément aux prescriptions du règlement d'attribution des prix (voir Annuaire de l'Institut, 1932, p. 601 et suiv.) les mémoires doivent parvenir au plus tard le 1er mars 1935 à M. Charles de Visscher, Secrétaire Général de l'Institut de Droit International, 200 Avenue Longchamp, Bruxelles.

NOTES

THE PERMANENT COURT OF INTERNATIONAL JUSTICE

THE year's decisions are discussed elsewhere, but this place is perhaps appropriate for the discharge of the pleasant duty of reminding readers that the Presidency of the Court is now in the hands of Sir Cecil Hurst, the first British subject to occupy this great position.

THE PERMANENT COURT OF INTERNATIONAL JUSTICE AS A COURT OF APPEAL

On December 15, 1933, the Permanent Court of International Justice rendered a judgment in the matter of the appeal from a decision of the Hungaro-Czechoslovak Mixed Arbitral Tribunal in the case of *Peter Pázmány University* v. *The State of Czechoslovakia*.[1] The Judgment of the Court was unanimous except for the vote of the Czechoslovak national judge, who delivered a Dissenting Opinion. International tribunals have in the past had occasion to review proceedings of municipal courts when dealing with claims arising out of alleged denial of justice. On rare occasions, as in the *Orinoco Steamship Company* case, decided by the Permanent Court of Arbitration in 1910, states have agreed in special agreements to entrust a tribunal with a review of a previous arbitral award said to have been vitiated by excess of jurisdiction. The appeal in the *Pázmány University* case had its origin in the Agreement of April 28, 1930, between the signatories of the Treaty of Trianon (other than Japan, China, Cuba, and Siam) and also Poland; in this agreement an article was inserted according to which Czechoslovakia, Yugoslavia, and Roumania, of the one part, and Hungary, of the other part, agreed to recognize, without any special agreement, a right of appeal to the Permanent Court of International Justice from all judgments on questions of jurisdiction or merits to be given in the future by the Mixed Arbitral Tribunals in certain classes of cases.

By the decision appealed against in the present case the Hungaro-Czechoslovak Mixed Arbitral Tribunal in February, 1933, held that it had jurisdiction to adjudicate, under Article 250 of the Treaty of Trianon, upon the claim brought before it by the Peter Pázmány University in Hungary for the restitution of its landed property situated in Czechoslovakia. It also decided on the merits that Czechoslovakia was bound to make this restitution. The Permanent Court, in a single judgment, rejected the appeal in regard both to the jurisdiction and to the merits.

It is beyond the scope of this note to give an account of the legal points of general interest raised in the Judgment of the Court, such as the jurisdiction of the Court in a litigation one of the parties to which is a private individual, the way in which the Court dealt with the questions of juristic personality and legal capacity, the plea of non-discrimination, and some interesting questions of treaty interpretation (including the attempt made by Czechoslovakia to attach "momentous consequences to the system of numbering" employed in indicating the paragraphs of an article in the treaty). The Judgment as a whole shows the feasibility and the usefulness of a highest jurisdiction of appeal from decisions of international tribunals less authoritative than the Permanent Court. If such

[1] Series A/B, No. 61.

jurisdiction had existed at the time of the *Hungaro-Roumanian Optants* dispute, international law would have been saved from much discredit.

H. L.

It may be permissible to call attention to one point incidentally mentioned in the *Pázmány University* case: the reference, that is, to a well-known passage in the *Polish Upper Silesia* case (Judgment No. 7, Series A) which is sometimes referred to as recognizing a supposed rule of international law to the effect that the expropriation of the property of aliens is illegal *apart from convention* even in cases where the law is *bona fide* of general application to all property-owners in the jurisdiction and no discrimination is made between the property of aliens and nationals. In the *Pázmány* case the Permanent Court remarks that "the Court has on several occasions and particularly in its Judgment of May 25, 1926 (Judgment No. 7) expressed the opinion that a measure *prohibited by an international agreement* cannot become lawful under that instrument simply by reason of the fact that the state concerned also applies the measure to its own nationals". The subject was discussed in articles appearing in Volumes VI, IX, and X of the *British Year Book*.

J. F. W.

The Gold Clause in the Permanent Court and the House of Lords

It is satisfactory to note the identity of the conclusions reached by the House of Lords, reversing the decisions of the Court of Appeal and Farwell J., in the Belgian bond case (*Feist* v. *Société Intercommunale Belge d'Electricité*, [1934] A. C. 161) and by the Permanent Court in the case of the Serbian Loans (P.C.I.J., Series A, Nos. 20/21), the latter decisions being cited (not of course as binding, but as a decision of the Supreme Court of the United States would be referred to) in the speech which expressed the judgment of the House of Lords. It is believed that this is the first time that a decision of the Permanent Court has been cited in an English case; the incident may help to dissipate any lingering illusion that the work of that Court is without interest to the lawyer practising in England. The time may perhaps come when English newspapers will find it worth while to report decisions of the Permanent Court in the same way as decisions of the House of Lords are reported.

THE GOLD CLAUSE: A GERMAN DECISION

English readers owe to the enterprise of an English newspaper (*The Economist*, November 30, 1933, p. 1279) an interesting piece of information as to a recent decision of the German High Court (Decree No. II. 109/33) bearing on this same "gold clause" problem. The decision was to the effect that when a commercial contract between a British seller and a German purchaser, dated, presumably, before this country "went off gold", states the price in sterling and contains a gold clause, the debtor must pay on the basis of 20.40 Reichsmarks to the pound sterling. From this and at least one other decision of importance it is clear that "Il y a des juges à Berlin" is as true now as in the days of the Great Frederick.

THE LOCARNO PACT AND THE LEAGUE OF NATIONS

It is worth placing on record for future reference that at some date in 1933 the Government of the United Kingdom consulted the Law Officers of the Crown

upon the effect of Germany's notice to withdraw from the League, and of her eventual withdrawal in 1935 if the notice runs its course, upon the Locarno Pact. The following passage from Hansard (Commons), Vol. 281, p. 62, indicates the extent of the Foreign Secretary's disclosure to the House of Commons on November 7, 1933, of the opinion received from the Law Officers:

"The question is whether the obligations of this country would be ended if Germany, two years hence, carried out the intention of which she has given notice to leave the League of Nations. . . . The view of the Government, after consulting the Law Officers of the Crown, is that the withdrawal of any party to the Treaty of Locarno from the League does not of itself and by itself involve the release of all parties from their obligations under the Treaty. But the withdrawal of Germany, if indeed it ever were to become effective, would raise issues of so far-reaching a character that it would be impossible to make any public statement upon them without careful consideration in consultation with the other parties to the Treaty."

The extent of the connexion between the Locarno Pact and the League may be summarized as follows:

(*a*) One of the main objects of the bunch of treaties commonly known as the Locarno Pact was to facilitate the entry of Germany into the League, and the Final Protocol of the Locarno Conference recites the intention of the other parties present at that conference to address to Germany (as they did) a letter containing explanations of Article 16 of the Covenant, and also declares it to be the conviction of the signatories that the entry into force of the treaties will "hasten on effectively the disarmament provided for in Article 8 of the Covenant . . .".

(*b*) The preamble to the Treaty of Mutual Guarantee states the signatories, Germany, Belgium, France, Great Britain, and Italy, to be "animated also with the sincere desire of giving to all the signatory Powers concerned supplementary guarantees within the framework of the Covenant of the League of Nations and the treaties in force between them".

(*c*) Article 2, whereby Germany and Belgium and Germany and France "mutually undertake that they will in no case attack each other or resort to war against each other", proceeds to exclude from this undertaking (i) the exercise of the right of legitimate defence, (ii) "action in pursuance of Article 16 of the Covenant . . .", and (iii) "action as the result of a decision taken by the Assembly or by the Council of the League of Nations or in pursuance of Article 15, paragraph 7, of the Covenant of the League of Nations, provided that in the last event the action is directed against a state which was the first to attack".

(*d*) Article 3, whereby "Germany and Belgium and Germany and France undertake to settle by peaceful means . . . all questions of every kind", provides for the submission of disputes "as to their respective rights" to judicial decision, and of "all other questions" to a conciliation commission and, failing the acceptance of the proposals of this commission, to "the Council of the League of Nations which will deal with it in accordance with Article 15 of the Covenant of the League".

(*e*) Article 4 provides that upon any allegation of a *casus foederis* the question shall at once be brought before the Council of the League, which if "satisfied that such violation or breach has been committed" . . . "will notify its finding . . ." to the signatories; moreover, in case of immediate action being taken as the result of "a flagrant violation" of Article 2 of the Treaty of Mutual Guarantee, or "flagrant breach" of Articles 42 or 43 of the Treaty of Versailles, the Council of the League is nevertheless seised of the matter and the parties undertake to

act in accordance with the Council's recommendations, provided that they are unanimous, excluding, however, the parties engaged in hostilities.

(*f*) Articles 5 and 7 also mention the League, and Article 8 provides that the treaty "shall remain in force until the Council, acting on a request of one or other of the high contracting parties notified to the other signatory Powers three months in advance, and voting at least by a two-thirds' majority, decides that the League of Nations ensures sufficient protection to the high contracting parties; the treaty shall cease to have effect on the expiration of a period of one year from such decision".

(*g*) Article 10 provides that the treaty "shall enter into force as soon as all the ratifications have been deposited and Germany has become a Member of the League of Nations". This last event took place in September 1926.

In fact only three out of the ten articles of the treaty fail to mention the League.

A. D. McN.

THE ANGLO-SOVIET TEMPORARY COMMERCIAL AGREEMENT, 1934

THERE is one point upon this Agreement (Cmd. 4513) upon which a comment may be made here.

Article 5, paragraphs (1) and (2), is as follows:

(1) In view of the fact that, by virtue of the laws of the Union of Soviet Socialist Republics, the foreign trade of the Union is a State monopoly, the Government of the United Kingdom agree to accord to the Government of the Union of Soviet Socialist Republics the right to establish in London a Trade Delegation, consisting of the Trade Representative of the Union of Soviet Socialist Republics and his two deputies, to form part of the Embassy of the Union of Soviet Socialist Republics.

(2) The head of the Trade Delegation shall be the Trade Representative of the Union of Soviet Socialist Republics in the United Kingdom. By virtue of paragraph (1) of the present Article he and his two deputies shall be accorded all diplomatic privileges and immunities, and immunity shall attach to the offices occupied by the Trade Delegation (5th Floor, East Wing, Bush House, Aldwych, London) and used exclusively for the purpose defined in paragraph (3) of the present Article. No member of the staff of the Trade Delegation, other than the Trade Representative and his two deputies, shall enjoy any privileges or immunities other than those which are, or may be, enjoyed in the United Kingdom by officials of the State-controlled trading organizations of other countries.

By this clause the Crown undertakes to ensure diplomatic privileges and immunities to certain persons not exercising diplomatic functions who would not normally enjoy diplomatic status. It is understood that it is not proposed to invite Parliament to make by legislation the change, if any, thereby involved in the law administered in British courts. The earlier Trade Agreement of March 16, 1926 (Cmd. 1207), between His Majesty's Government and the Government of the Russian Socialist Federal Soviet Republic came before the Court of Appeal in *Fenton Textile Association* v. *Krassin* (1921), 38 T.L.R. 259. By that Agreement, whose provisions did not receive any legislative enactment, each party was authorized to appoint official agents for the purpose of giving effect to the Agreement, and these persons were to receive liberty to enter and sojourn in the territory of the other party, liberty to communicate freely by post, telegraph, and otherwise, and also immunity from arrest and search. M. Krassin, an official agent appointed under the Agreement, was sued for the price of goods sold and delivered, and claimed that the writ should be set aside on the ground that by

reason of the status conferred upon him by the Trade Agreement and certain other contracts with His Majesty's Government he was the diplomatic representative of his Government and as such was entitled to immunity from civil process. He did not, because he could not, base this claim upon the express provisions of the Trade Agreement. The Court of Appeal held that he was not a diplomatic representative and was therefore not entitled to immunities other than those granted to him by the Trade Agreement. It therefore never became necessary for the court to face the question whether this Agreement required legislative enactment to make its provisions binding upon English courts, but there is nothing in the judgments of Bankes, Scrutton, and Atkin L.JJ. to suggest that legislative enactment was necessary, and indeed the judgments, particularly that of Atkin L.J. (towards the end), may be said to lend some support to the contrary view.

It might, it is submitted, have been permissible in 1922 to doubt the view that no legislative enactment is required to confer diplomatic immunities upon a non-diplomatic person, but since the decision of the House of Lords in *Engelke* v. *Mussman*, [1928] A.C. 433[1] it seems probable that the courts would regard themselves as being concluded by a statement made to them on behalf of the Foreign Office to the effect that the Crown had conferred diplomatic immunities and privileges upon A.B., whether or not he had been added to the Foreign Office list. A case arising under the recent Anglo-Soviet Agreement would not be as strong as *Engelke* v. *Mussman*, because in that case it is clear from the Attorney-General's statement, printed in [1928] 1 K.B. at p. 93, that the defendant was performing some diplomatic functions. Moreover, Lord Phillimore said ([1928] A. C. at p. 451): "the status which gives the privilege has been already created by the Crown in virtue of its prerogative in order to administer its relations with a foreign country in accordance with international law", but I do not think that the right of the Crown can be said to be limited to the creation of such privileges as it is required by international law to create. On the whole then it seems probable that the courts would regard the case as governed by *Engelke* v. *Mussman* and uphold, without legislative enactment and upon a statement made in court on behalf of the Crown, the diplomatic immunities conferred upon the Soviet Trade Representative and his two deputies by the Agreement of 1934.

A. D. McN.

OUTLAWRY OF A FOREIGN SOVEREIGN

John Selden's *Table Talk* is perhaps not a quarry from which international lawyers are normally accustomed to draw their law. But there is one passage[2] at any rate in that collection of pithy wisdom of the seventeenth century which may serve to put some of our readers on further inquiry as to the standing of foreign sovereigns in English municipal courts. Here is the passage—the spelling being modernized (and as it is a report by Counsel of a case in which he was himself engaged, it might presumably be quoted as a precedent in an English court to-day):

"The King of Spain was outlawed in Westminster Hall, I being of counsel against him. A merchant had recovered costs against the King of Spain in a suit, which because it

[1] See Sir Cecil Hurst in this *Year Book*, 1929, pp. 1–13.

[2] See at p. 68 of Sir Frederick Pollock's edition, printed for the Selden Society, Quaritch, 1927.

could not be got, we advised to have him outlawed for his not appearing; and so he was. As soon as Gondomar[1] heard that, he presently sent the money, by reason if his master had stood outlawed he could not have had the benefit of the law, which would have been very prejudicial, there being then many suits depending between the King of Spain and our English merchants."

Was the effect really to make the King of Spain *caput lupinum* in England?

"O"

A PRECEDENT FOR ARTICLE 59 OF THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

If our courts in the early part of the seventeenth century had so small reverence for the most powerful—or supposed so to be—monarch of the European continent, they were at the same time rather nearer to European practice in the matter of precedent than they have since become. For the rule at that time, again *ex relatione* Johannis Selden,[2] was that:

"In this or that particular case the King's Bench will declare unto you what the law is, *but that binds nobody but whom that case concerns*. So the highest court, the Parliament, may do. . ."

Did the draftsmen of Article 59 of the Statute of the Court have this passage in mind when they wrote:

"The decision of the Court has no binding force except between the parties and in respect of that particular case."?

And yet, as we all know, you may expel precedents with a pitchfork, but no court that aspires to consistency (and without consistency there can be no law) will attempt to prevent their perpetual (and permanent) return, as guides at any rate, if not as dictators.

"O"

ARBITRATIONS (LAW APPLICABLE BY REFERENCE TO THE STATUTE OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE)

A recent concession agreement between a foreign government and an English company contains the following provisions:

"Les Parties contractantes déclarent baser l'exécution de la présente convention sur les principes réciproques de la bonne volonté et de bonne foi ainsi que sur l'interprétation raisonnable de cette convention.

"Seront tranchés par la voie d'arbitrage tous différends de nature quelconque entre les parties.

"La sentence se basera sur les principes juridiques contenus dans l'article 38 du Statut de la Cour Permanente de Justice Internationale.

"La procédure de l'arbitrage sera celle qui sera suivie au moment de l'arbitrage par la Cour Permanente de Justice Internationale."

The agreement also provides that if the parties or the two arbitrators appointed by them are not able to agree on the person of the umpire, that umpire is to be appointed by the President of the Permanent Court of International Justice.

Under Article 38 the Permanent Court has to apply (1) international conventions, (2) international custom, and (3) "the general principles of law recognized by civilized nations". It also has to use as subsidiary means for the determina-

[1] The Spanish Ambassador. This reference may help to date the incident.

[2] *Ibid.*, p. 69.

tion of rules of law *inter alia* "judicial decisions and the teachings of the most highly qualified publicists of the various nations".

For the questions arising out of the daily working of a concession agreement it is most important to consider how "the general principles of law recognized by civilized nations" are to be ascertained. It is submitted that those "general principles" do not include rules as to conflict of laws, as such rules could by *renvoi* let in the application of a principle of a system of law which would not be a "general principle". It is further submitted that under the provisions of the concession set out above, the general principles would include the rules of evidence (compare Fachiri, *The Permanent Court*, 2nd ed. 1932, p. 103). The "general principles of law" include not only principles of international law but also principles of private law (compare Le Fur, "La Théorie du droit naturel" in Hague, *Recueil des Cours*, Vol. 18, p. 364) and *inter alia* constitutional and administrative law (compare Lauterpacht, *Private Law Sources and Analogies in International Law*, 1927, p. 70). Those principles may sometimes "threaten to degenerate into altogether natural law or legal philosophy" (Lauterpacht, *l.c.*), but it is submitted that Article 38 does not force the court to deal with a case as if it were tried by ideal judges in an ideal state with an ideal system of law. That article directs the judges to ascertain in the first instance the state of law in civilized communities on specific questions and to refrain from applying unusual rules of law or custom peculiar to a national system of law but not generally recognized by civilized nations. It also allows them to apply such rules which the living law of civilized nations has generally *adopted*. The decisions of the Permanent Court already contain rulings based on general principles, for instance on abuse of rights, *res judicata*, questions of evidence. Article 38 does not refer the judge to the vague notion of the "legal conscience of civilized peoples"—an expression originally suggested in the Committee for Drafting the Statute of the Permanent Court (Lauterpacht, *l.c.*, p. 68), but points to the living law of civilized nations as a solid base for building up "*una specie . . . di novissimo jus gentium nel senso classico*" (Anzilotti).

V. R. I.

THE MANDATED TERRITORY OF SOUTH-WEST AFRICA

Two especially interesting problems have emerged in the forefront of South-West African affairs in the course of the past twelve months. Both are closely related in that they have a common origin in the peculiar composition of the population of the mandated territory. It will be recalled that at the inception of the mandate system South-West Africa possessed a comparatively large proportion of European settlers. These were in the main of German nationality, although during the period of occupation which preceded the creation of the mandate a number of settlers had entered from the Union of South Africa. When the Union Government accepted the mandate it did not avail itself of the power given by Article 122 of the Treaty of Versailles of repatriating the German nationals from the mandated territory. It not only allowed such nationals to remain but also to take a part in the measure of self-government granted by the South-West African Constitution Act (Union Act No. 42 of 1925). This latter privilege was however confined to such as had not refused naturalization under Act No. 30 of 1924, the provisions of which automatically naturalized adult Europeans of late enemy nationality domiciled in the Territory unless they

signed a declaration that they were not desirous of being so naturalized. Very few of the persons concerned signed such a declaration and failed to obtain the franchise, but their number has been augmented by the entry of other settlers of German nationality, although naturalization and enfranchisement remain open to such through the ordinary channels. In consequence, the European section of the population of the Territory has the peculiar composition earlier commented upon. Of those possessing British nationality and the franchise a large portion are of German origin and the remainder settlers from the Union. In addition there are those settlers, mainly of German nationality, who have not been naturalized and are disfranchised.

It was, perhaps, inevitable that political orientation should develop on racial lines, and the broad demarcation of parties is between settlers of German and settlers of Union origin. For a period following Act 42 of 1925 a measure of co-operation was achieved. The period of world economic depression, however, accompanied by unusual drought has placed the Territory in a particularly parlous condition, and has been accompanied by the emergence of considerable antagonism between the two main parties. The two main points of contention appear to be firstly, the future form of administration of the Territory, and secondly, the spread of Nazi-ism therein.

In regard to the former, it is the considered view of the Union section that South-West Africa is unable to carry on under the present form of administration, which treats the Territory as a unit distinct from the Union. That section desires the incorporation of the Territory in the Union as a fifth province although it does not press for the termination of the mandate itself. Such a procedure involves obvious difficulties, and the Union Government, unfortunately, owing to political developments within the Union itself, has been unable to make any pronouncement of its policy in relation thereto. At the base of the desire is undoubtedly the serious financial position of the Territory, but its expression has been accelerated by the second point of contention, the spread of Nazi-ism.

The progress of the Nazi movement in the Territory has been such as to render the breach between the Union and German sections unbridgeable and led to the passage through the South-West Legislative Assembly of the Criminal Law Amendment Ordinance of 1933, which has now been approved by the Union Government. The Ordinance empowers the Administrator and Executive Committee to suppress any organization, foreign or otherwise, which in their opinion is detrimental to the interests of the Territory. The immediate consequence has been the decision of the German members of the executive and legislative bodies not to co-operate in the government of the Territory.

The present position of the Territory and the performance of the mandate are thus fraught with great difficulties and it is to be hoped that the Union Government will at the earliest opportunity attempt to discover a solution therefor.

THE "EMANDATION" OF SYRIA

The French have had an uneasy passage in Syria ever since the mandate for that country was allotted to them in 1920. They had to face a serious insurrection in 1925 and 1926, and they have had to struggle against a firm demand for complete independence during recent years. In the Lebanon, indeed, where the population is largely Christian, they succeeded in forming an autonomous republic with a constitutional government, which entered into a Treaty of Alliance with

the Mandatory. But in Syria, in the narrower sense, that is the eastern part of the mandated territory which contains the four historical towns, Damascus, Homs, Hama, and Aleppo, and has a mainly Moslem population, their efforts to implement the first article in the mandate, which directs them to foster self-government, have constantly been thwarted by the objection of the Nationalist leaders to the basic conception of the mandate. Following elections in 1932, they contrived, not without difficulty, to establish an autonomous republic in Syria, with a Moslem President and an elected Parliament. Since then the new High Commissioner has negotiated with the Syrian Government for an arrangement which, following the model of the Anglo-Iraqi Treaty, should put a term to the French mandate, and at the same time assure the special French interests. A treaty providing for the termination of the mandate and French support of Syria's application for admission to the League of Nations after a transitory or probationary period of four years, was signed with the Syrian leaders in November 1933. When it was submitted to the Syrian Parliament for adoption, the uncompromising resistance to any French control reopened differences. The Nationalists demand a single, united, independent Syria; they object to the separation of the Lebanon on the one hand, and the special position of the *Liwas* or provinces of Syria on the other. The treaty, too, contemplates the continual presence in Syria for another 25 years of French troops, a French military mission, and French advisers and magistrates.

It has been the French policy from the beginning to divide and rule. Relying on the principle that the mandatory Power must protect minorities, France has separated the northern coastal region, the country of the peculiar Alaouite sect, from the rest of Syria and the Lebanon, and placed it under direct French administration. Faced again with the special problem of the warlike Druses, who challenged her rule for nearly two years, and who are also a distinctive religious and racial minority, she has likewise instituted a special direct régime for the "Druse Mountain". She is not prepared to relinquish her special functions and obligations in these portions of the mandated territory; and the treaty provides for her retaining there special administrative control. Her attitude is more logical and, on the face of it, more conscientious than the English policy in Iraq, where, despite warnings on the one side and solicitations on the other, the British Mandatory urged before the Permanent Mandates Commission the complete and unqualified "emandation" of the whole country, and gave a moral assurance that the minorities interested would be duly safeguarded by the new independent state. In the light of after-events that was a rash assurance; and the troubles of the Assyrians and Kurds in Iraq appear to justify the policy of a more gradual emancipation in Syria. Yet inevitably, the caution of the guardian provokes the temper of the pupil. It seems an affront to the people to be emancipated that their territory should be truncated. There may, too, be an opposition to the arrangement from another quarter and another angle. The Permanent Mandates Commission has been doubtful all the time as to the maturity of either Iraq or Syria for full emancipation. It could not take its courage in its hands when faced with the simple proposal and the confident assurance of Great Britain with regard to Iraq. It may be bolder when considering the more complicated proposal of the French mandatory, which is almost a self-confessed denial of Syrian fitness for complete independence. The Commission may object to the interposition of a new status, which is neither independence nor tutelage, but a tutored alliance of the

whole and subjection of the part. If it takes that stand, and seeks accordingly to convince the Council of the League—which ultimately has to take executive action—it will have given a fresh and welcome reality to the idea of international trusteeship.

N. B.

THE ST. LAWRENCE WATERWAY TREATY

THE rejection of the St. Lawrence Waterway Treaty by the United States Senate will occasion no surprise, but it may well suggest certain reflections and comparisons. There is an obvious analogy between this decision and the refusal of the Dutch Upper House to ratify the Belgian-Dutch treaty of 1925, which would have inaugurated an ambitious scheme for the common development of the intricate waterway system of the Low Countries. In each case there was a fundamental conflict between two groups of economic interests. The construction of the Moerdyk Canal would in effect have made Antwerp a port on the Rhine, just as the deepening of the St. Lawrence channel would have put Chicago and other inland ports on the Upper Lakes into direct communication with the sea. There is a difference between the two problems in the fact that in the American case the conflict of interests did not entirely follow the international line. The divergence between Holland and Belgium was genuinely international, for the essential conflict was between Rotterdam and Antwerp. In the St. Lawrence case the interests opposed were those of the Atlantic ports on the one hand and those of the American Middle West on the other, so that the Canadian opposition based on Montreal found eager allies in New York and Boston. A similar line of division applies also to the other question involved in the control of the St. Lawrence, the problem of the Chicago diversion. Here again all the lower riparian interests, irrespective of the political frontier, have found themselves at one in their resistance to the immense appropriation of water by Chicago.

Turning from comparisons to reflections, we may regard these cases as illustrations of the immense difficulty there must always be in carrying through important changes in a political field where change, if it is to be peaceably effected, must rest upon agreement rather than upon authority. Great engineering schemes involving a substantial interference with the existing order of nature can scarcely be carried through without some disturbance of present economic interests, and we can hardly expect great commercial communities to support proposals for diverting trade to their competitors. If the development of Gdynia had depended upon the consent of Danzig or of Germany, it is safe to say that Gdynia would still be a fishing village. In this case Poland held in her own hands the authority necessary for the carrying out of her own policy. In the case of the Low Countries, the failure of the attempt to reach results by agreement has led each of the contending states to protect its own interests by unilateral action on its own territory. Holland has dug the Juliana Canal, and Belgium has countered with the Albert Canal, each enterprise involving an interference of very doubtful legality with the natural course of the waterways. Across the Atlantic it has been hinted to Canada that her refusal to ratify the treaty might be met by a deepening of the canals in American territory which connect Lake Ontario with the Hudson River and the sea. But the death-blow to the treaty has now been dealt in Washington, and it will be difficult for Chicago to retaliate upon New York, unless she revives her old scheme of draining sufficient water from Lake Michigan to create a deep waterway to the Gulf of Mexico. Here again we can see the

immense importance of a common authority, for the Federal Government has already vetoed the Chicago scheme, and it could not now be carried out without a disruption of the Union. Nearer home we may read the same lesson, for a united Germany has recently resumed the long abandoned work of Charlemagne and is digging a Rhine-Danube canal.

To the minds of some, not including the writer of this note, such reflections will seem to be arguments in favour of a super-state, a world-power for which it will be as easy to cut through continents and divert great rivers as it was for our Parliament to order the digging of the Manchester Ship Canal. There are others who may find comfort in the fact that international law and state sovereignty still impose some restraints upon the ambitions of those who are continually seeking to change the physical configuration of our planet. But this note is no place for continuing a debate which has lasted for centuries and seems likely to last through centuries yet to come. In the meantime we may do well to be on our guard against the danger, only too apparent in much current writing, of confusing our theories as to the future ordering of the world with the facts of its present order. The independence of sovereign states is still the basic fact of the law of nations. If and when all states fall under the rule of a common sovereign, their mutual relations must undoubtedly be governed by law, but that law can no longer be called international.

H. A. S.

HAGUE ACADEMY OF INTERNATIONAL LAW

The Academy held its usual session at The Hague in July and August 1933 in the recently erected handsome separate building now dedicated to its work in the grounds of the Palace of Peace. The programme of lectures was as varied as usual, and the attendance of students from most parts of the world was satisfactory. But the writer takes this opportunity of expressing his regret that British students do not make better use of this institution; they will, in most cases, never have a better opportunity of making a close acquaintance with continental views of international law as expounded by men of recognized authority; the personal touch given by a lecture cannot adequately be replaced by the reading of a book, especially in a case where what is essential is the appreciation of an atmosphere, not in conflict with, and yet not the same as, that which prevails in an English university.

It is proposed to enrich the hall of the Academy, after the practice of a College Hall in a university, with portraits of the bearers of distinguished names in international law. The portrait of Mr. James Brown Scott is there already—a fit tribute to the devoted service which he has given to the Academy—and it is to be hoped that amongst others a portrait of John Westlake may also soon be in place.

INSTITUTE OF INTERNATIONAL LAW

The Institute held no plenary session last year (1933), but several of its committees met at Luxembourg, that singularly prosperous and attractive city, for about a week's work in August. The result of what is to some extent a new departure in method should be visible at the next plenary session which is to be held in October next at Madrid.

Advantage was taken of the meeting by the judges of the work of competitors for the "Westlake" Prize to make their first award.

It will be remembered that at the Oslo meeting in 1932 considerable attention was devoted to the question of the effect of a change of nationality by an individual preferring a claim against a state. This subject is discussed further with some fullness by Professor Borchard in an article in the *Yale Law Journal* for January 1934.

THE GROTIUS SOCIETY

The Eighteenth Annual Meeting of the Grotius Society was held on April 27, 1933, in the office of the Society under the Chairmanship of Mr. Herbert F. Manisty, K.C., when the Rt. Hon. Lord Hanworth, Master of the Rolls, was elected President for the year 1933–4. A paper was read by Mr. Norman Bentwich, formerly Attorney-General in the Government of Palestine, on "The League of Nations and Racial Persecution in Germany".

The nineteenth volume of the Transactions of the Society, in addition to the above paper, contains papers by Mr. Eric G. M. Fletcher, LL.D., on "John Selden and his contribution to International Law"; by F. Llewellyn-Jones, LL.B., M.P., on "Treaty Revision and Article 19 of the Covenant of the League of Nations"; by Mr. Registrar A. Stiebel on "The Statute of Westminster and its Effect"; by Sir Fiennes Barrett Lennard on "Some Aspects of Colonial Law"; by Wyndham A. Bewes on "Gathered Notes on the Treaties of Westphalia"; by Master E. A. Jelf on "What is War? What is Aggressive War?"; by Mr. Wickham Steed on "Revision of the Peace Treaties"; by Mr. M. Caloyanni on "The Balkan Pact"; by Sir Eldon Manisty, K.C.B., C.M.G., on "The Navy and International Law"; and by Mr. F. Temple Grey on "The Tendencies of International Law".

INTERNATIONAL LAW ASSOCIATION

The Association will hold its 38th Conference in September this year at Buda-Pest. Among the subjects for discussion are Cartels, Insolvency, Trade Marks, and Trade Names, partially dealt with at the Oxford meeting in 1932, the effect of the Briand-Kellogg Pact on International Law, the Nationality of Married Women, certain problems of international payments and of insolvency and the competence of international courts.

CONGRESS OF SLAV JURISTS

British lawyers will read with interest and sympathy an account of the first meeting of a Congress of Slav Jurists, which was held at Bratislava in September 1933. The Congress was attended by lawyers from Czechoslovakia, Poland, Yugoslavia, and Bulgaria. A full report of the proceedings has not reached this journal, but we have received a copy of a paper on the Bulgarian law of mortgages of inland navigation craft by Dr. Katzaroff of the University of Sofia. The conclusions of the réport in favour of the unification of this chapter of the law of the several states interested take rank with many other indications of the necessity for the facilitation of commercial intercourse between all states who use the Danube.

J. F. W.

SOME DECISIONS OF THE UNITED STATES SUPREME COURT

Jurisdiction over International Boundary Stream

In the case of *Pigeon River Improvement, Slide and Boom Company* v. *Charles W. Cox, Ltd.*, the United States Supreme Court on January 15, 1934, overruling

a decision of the Circuit Court of Appeals, held that the imposition of tolls by an American corporation acting under the authority of the State of Minnesota, upon a Canadian corporation for the use by the latter of certain works constructed by the Minnesota corporation in the Pigeon River, a boundary stream between the United States and Canada, at points where the river was impassable, was not a violation of the Webster-Ashburton treaty of 1842. The Canadian corporation was engaged in the business of floating timber down the river into Lake Superior. The treaty provides that all water communications and portages between the two countries shall be "free and open" to the use of the citizens and subjects of both countries. The Circuit Court of Appeals (*Fed. Rep.*, Vol. LXIII, 2nd Ser., p. 56) had held in 1933 that the business of floating timber on the river was foreign commerce over which the State of Minnesota had no right to exercise control through the granting of a franchise to a corporation authorized by it, to collect tolls on such commerce. It based its decision, in large part, on the diplomatic correspondence between Great Britain and the United States during the negotiation of the treaty, which, in the view of the Court, indicated that it was the intention of the parties that the river in question was to be free of the control of either party.

The Court quoted from the decision of the Supreme Court of Ontario in the case of the *Arrow River and Tributaries Slide and Boom Co. Ltd.*, a Canadian corporation (*Ont. Law Reports*, Vol. LXVI, p. 577, 1931) which had reached the same conclusion but whose decision was subsequently reversed (March 15, 1932) by the Supreme Court of the Dominion of Canada by a vote of 3 to 2 judges, which held that the Webster-Ashburton treaty did *not* forbid the collection of tolls by the Canadian corporation for the use by the Minnesota corporation of the Arrow River Company's improvements in the river on the Canadian side of the boundary line (*D.L.R.*, Vol. II, p. 216, and the notes in this *Year Book*, 1932, p. 123, and 1933, p. 148). The latter decision was brought to the attention of the Circuit Court of Appeals but it adhered to its former decision. There was therefore a conflict between the decisions of the highest Canadian Court and the United States Circuit Court of Appeals. Upon appeal to the United States Supreme Court, the decision of the Circuit Court of Appeals was reversed. The Supreme Court pointed out that as a result of the conflict of decisions between the Supreme Court of Canada and the United States Circuit Court of Appeals, it was lawful for the Canadian corporation to impose tolls on the American corporation for the use by it of the complementary works constructed on the Canadian side of the boundary line by the former corporation, whereas the Minnesota company could not collect tolls from the Canadian company for the use by it of the works constructed by the Minnesota company on the American side of the line. The Court took into account the peculiar character of the boundary stream which, as stated above, was impassable at points on account of rapids and falls, and reached the conclusion that it could not have been the intention of the parties to prohibit an improvement which would make the stream navigable and the imposition of reasonable and non-discriminatory charges for the use of such improvement. In any case, the provisions of the treaty being ambiguous it was the duty of the Court to look to the "practical construction" which the parties had placed upon it. The Congress of the United States had given its consent to the creation of the works on the American side of the river and the State of Minnesota had authorized the imposition of tolls for

their use. The Province of Ontario had done likewise in regard to the works constructed on the Canadian side of the line. Neither party to the treaty had ever made any representations to the other that these improvements and the charges levied for their use were in violation of the treaty of 1842, and the treaty of 1909 for the settlement of all boundary questions between the United States and Canada recognized the said improvements as being lawful. Moreover, the International Joint High Commission provided for by the treaty of 1909 had never taken any action inconsistent with this view. In the light of this "practical construction" of the treaty of 1842, the Supreme Court concluded that the imposition of the tolls complained of was not inconsistent with the treaty.

It may be remarked that in this case the Court reaffirmed the traditional rule of American jurisprudence that where the provisions of a treaty and a subsequent Act of Congress are in conflict the courts will apply the Act of Congress and disregard the treaty, although an intention to abrogate or modify a treaty will not be lightly imputed to Congress.

Jurisdiction of United States to Punish Crime Committed on American Merchant Vessels in Territorial Waters of Foreign States

An important decision of the United States Supreme Court was rendered on April 10, 1933, in the Case of *United States* v. *Santos Flores* (289 U.S., 137) involving the question of the constitutional power of the United States to punish crimes committed on its own vessels outside its territorial jurisdiction. The facts were that a citizen of the United States murdered another citizen of the United States on an American vessel, the *Padnsay*, while it was at anchor in a port in the Belgian Congo, a place subject to the jurisdiction of the Belgian state. At the time the crime was committed the vessel was attached to the shore by cables, at a point 250 miles inland from the mouth of the river. The offender being brought into the port of Philadelphia, the case against him was dismissed by the United States District Court on the ground that the crime was committed in a place outside the jurisdiction of the United States. This decision followed that reached by the same court several years earlier in a similar case (*ex rel Maro* v. *Mathues*, 21 F. (2nd) 533, affirmed by the Circuit Court 27 F. (2nd) 518) where a seaman on an American ship lying in the harbour of Leghorn, Italy, and attached to the wharf by cables, inflicted a wound upon another seaman from which he subsequently died. Considering the importance of the principle involved in these cases the Government decided to appeal the case to the Supreme Court for a final determination of the question. The two questions before the Supreme Court were: (1) whether the jurisdiction of the Federal Courts which under Art. III, sec. 2, of the Constitution includes "all cases of admiralty and maritime jurisdiction" may be extended by Act of Congress to crimes committed by citizens of the United States on board American merchant vessels while in the navigable waters of another country, and (2) whether Congress had in fact done so by sec. 272 of the Federal criminal code, under which the indictment in the present case was found. It was contended by the appellee, and this contention had been sustained by the lower court, that the power of Congress under Art. I, sec. 8, of the Constitution to provide for the punishment of crimes committed on the high seas did not extend to the punishment of crimes committed on American vessels while not on the high seas but within the territorial limits of foreign countries. The Supreme Court rejected this interpretation. The article of the

Constitution which extends the jurisdiction of the Federal Courts to all admiralty and maritime cases, had, it said, been "consistently interpreted as adopting for the United States the system of admiralty and maritime law, as it had been developed in the admiralty courts of England and the colonies" and which by implication conferred on Congress the power, subject to some limitations not material in this case, to alter, qualify, or supplement it as experience or changing conditions may require. Decisions of the English courts were cited as authority for the view that the jurisdiction of Great Britain to punish crimes on vessels of British nationality follows such vessels upon the high seas and into the ports and rivers of foreign states. From the establishment of the independence of the United States, Congress had asserted the power analogous to that exercised by English Courts of Admiralty, to punish crimes committed on American vessels not only while on the high seas but also when on navigable waters outside the territorial jurisdiction of any state, and this legislation had been upheld by the Supreme Court (*U.S.* v. *Rodgers*, 150 U.S. 249). The Court admitted that the criminal jurisdiction of the United States was, "in general, based on the territorial principle, and criminal statutes of the United States are not by implication given an extra-territorial effect". But it added that this principle had never been considered as applicable to a merchant vessel which, for purposes of the jurisdiction of the courts of the country whose flag it flies, to punish crimes committed upon it, is deemed to be a part of the territory of that state even when in the territorial waters of another state. The Court admitted that the power to punish in such cases is limited by the jurisdiction of the other state within whose territory the crime is committed. In case the latter state asserts jurisdiction there is not entire agreement among writers on international law, nor is the practice conclusive, as to which of the two sovereignties should yield to the other. But since Belgium did not in the present case assert jurisdiction, it was not necessary for the Court to express an opinion on that point.

Extradition for Crimes which are not such under the Law of the particular State of the American Union in which the Fugitive is Found

In the case of *Factor* v. *Laubenheimer* (54 Sup. Court 191, December 4, 1933) the Supreme Court was called upon to decide whether under the extradition treaties between Great Britain and the United States the latter was bound to extradite a person charged with committing an offence in Great Britain which was not an offence under the laws of Illinois in which State the alleged offender had been apprehended and arrested. The application for extradition was based on the charge that Factor had in London "received from Broadstreet Press Limited" certain sums of money "knowing the same to have been fraudulently obtained". The Federal District Court ordered him to be released from custody on the ground that the offence charged did not come within the terms of any extradition treaty in force between Great Britain and the United States, because it was not a crime under the laws of Illinois. On appeal, the United States Court of Appeals reversed the judgment of the lower court on the ground that the offence *was* a crime in Illinois as had been declared by the Supreme Court in *Kelly* v. *Griffin* (241 U.S. 6). The case was removed to the Supreme Court on certiorari. The petitioner there contended that under the Webster-Ashburton treaty of 1842 and the Supplementary Convention of 1889, extradition could not be granted unless the offence charged was a crime according to the law of the

particular state where the fugitive was found, which, it was alleged, was not the case here. The petitioner further contended that this was a general principle of international law which the above-mentioned extradition treaties, if properly interpreted, meant to give effect to. The Supreme Court in affirming the judgment of the Court of Appeals took the position that the principles of international law recognize no right to extradition apart from treaty obligations and therefore the decision in this case must be based on the provisions of the existing extradition treaties. Article X of the treaty of 1842 bound the parties to deliver up fugitives charged with any one of several specified crimes, of which the crime charged against Factor was not one. But the convention of 1889 added a number of crimes to the list contained in the treaty of 1842, some of which were declared to be extraditable only in case they were crimes according to the laws of both countries. Various others, however, were enumerated to which this limitation was not made applicable, and among them was the crime with which Factor was charged.

The Supreme Court declared that if the view of the petitioner had been the intention of the parties to the treaty, that meaning would have been expressed in connexion with the enumeration of the treaty offences rather than in the proviso clause permitting extradition only in cases where the offence was a crime according to the law of the asylum state. This clause in its entirety, the Court thought, deals only with matters of procedure and merely goes to the quantum of proof necessary to establish the fact of the commission of the crime. The Court emphasized that where there are conflicting interpretations regarding the meaning of a treaty it is an established rule of the Court to give the preference to the broad and liberal interpretation, so as to enlarge rather than restrict the rights claimed under it. It was also pointed out that from the very beginning the State Department had construed Article X of the treaty of 1842 in accordance with the interpretation here adopted by the Supreme Court. It observed further that when the contracting parties are once satisfied that an identified offence is generally recognized as criminal in both countries, there is no occasion for stipulating that extradition shall fail merely because the fugitive may succeed in finding, in the country of refuge, some state, territory, or district in which the offence charged is not punishable. If the treaty were thus interpreted its reciprocal operation would be restricted, since the right of Great Britain to extradition from the United States would vary according to the criminal laws of the state or territory where the fugitive is found, whereas Great Britain would be under an obligation to deliver up a fugitive charged with any offence mentioned in the treaty, regardless of the particular place within its territorial jurisdiction in which he might be found. It may be remarked in this connexion that although the offence charged against Factor was not a crime under the laws of Illinois, or under any Federal law, it was a crime according to the laws of many of the American states.

Finally, the petitioner contended that the extradition treaty of 1932 which does not mention as extraditable the offence with which he was charged and which, as he argued, superseded the treaties of 1842 and 1889, was in force, notwithstanding the fact that no Order in Council for the publication and the putting of the treaty into effect had ever been promulgated in accordance with the requirements of British law and in conformity with the terms of the treaty itself (Art. XVIII), and notwithstanding also that the Department of State of the

United States does not, as he asserted, recognize the treaty as being in force in either country, although the ratifications had been proclaimed by the President on August 9, 1932. (In fact the Department of State has never made any ruling on this point.) The Court found it unneeessary to decide the question whether the treaty of 1932 was or was not in force and binding on the United States but not on Great Britain, for the reason that no Order in Council had been issued for the putting of the treaty into effect, since in its opinion if the treaty were held not to be in force it could not be said that the obligation of the United States would not extend to the offence charged or that the substitution of that treaty for the earlier ones would abate the proceedings against Factor.

Considering that the Supreme Court had in earlier cases adopted the view that extradition cannot be granted unless the act charged is a crime according to the law of the particular State of the American Union in which the fugitive is found (*Wright* v. *Henkel*, 190 U.S. 40 and *Collins* v. *Loisel*, 259 U.S. 309)—a view which is approved generally by text writers and appears to be in accordance with British legislation (33 and 34 Vict., c. 52, secs. 10, 26, and Piggott, *Extradition*, pp. 23, 107), the decision of the majority in this case (three justices dissented) has been criticized as representing a "strained" interpretation of the treaty (see the note in *Columbia Law Review*, Vol. XXXIV, January 1934, p. 178). Nevertheless, it ought to be approved as being in accord with sound prineiples of inter-state comity and the duty of states to co-operate whole-heartedly with one another in their efforts to punish crime.

Right of a State under International Law to tax Property of Non-Resident Aliens

In the case of *Burnet* v. *Brooks* (288 U.S. 378) the Supreme Court affirmed the right of the United States under international law to levy and collect a tax on securities belonging to a non-resident alien and physically within its territorial jurisdiction. The tax in question had been levied on the estate of a British subject resident in Cuba when he died in October 1924. A contrary decision in the case had been rendered by the United States Board of Tax Appeals and its decision had been affirmed by the United States Circuit Court of Appeals (60 F. (2nd) 890). Both decisions were overruled by the Supreme Court. "The United States", said the Supreme Court, "as a nation with all the attributes of sovereignty, is vested with all the powers of government necessary to maintain an effective control of international relations. So far as our relation to other nations is concerned, and apart from any self-imposed constitutional restriction, we cannot fail to regard the property in question as being within the jurisdiction of the United States—that is, it was property within the reach of the power which the United States by virtue of its sovereignty could exercise as against other nations and their subjects without violating any established principles of international law." The Court cited in support of its view the decision of the House of Lords in *Winans* v. *Attorney-General*, [1910] A.C. 27, where the liability to an estate duty under the British Finance Act of 1894, of bonds and certificates owned by an American citizen and physically within the United Kingdom at the time of the death of the owner, was affirmed. Lord Atkinson was quoted as saying in that case that the securities in question "being physically situated in England at the time of their owner's death, they were subject to English law and the jurisdiction of the English courts, and taxes might therefore *prima facie* be leviable upon

them" and that there "does not appear, *a priori*, to be anything contrary to the principles of international law, or hurtful to the polity of nations, in a state taxing property physically situated within its borders, wherever its owner may have been domiciled at the time of his death". Lord Shaw of Dunfermline expressed a similar opinion.

The Supreme Court referred to the efforts that had been made to bring about an international agreement to relieve property in such cases from double or multiple taxation, but it concluded that until such an agreement had been reached, and the United States had become a party to it, the right to levy the tax in question could not be denied on the ground that it violated any established rule of international law.

The Great Lakes Diversion Case

The *Year Book* for 1931 (p. 202) contained a note on the decree of the United States Supreme Court of April 21, 1930 (281 U.S. 696) enjoining the State of Illinois and the Chicago Sanitary District from diverting after July 1, 1930, water from the Great Lakes in excess of 6,500 cubic feet per second, in addition to domestic pumpage. At the request of the complainant States (Michigan, Minnesota, Ohio, and Wisconsin), the Court later appointed a special master to inquire into and report upon the reasons for the delay on the part of the defendants in constructing the necessary sewage disposal works for removing the necessity of further diversion, and upon the financial measures for enabling them to comply with the terms of the Court's decree. On the basis of his report, which was to the effect that the cause of the delay was due to the inability of the Sanitary District to raise the necessary funds because of the unmarketability of its bonds and the impossibility of obtaining money by means of taxation or special assessments, the Court on May 22, 1933, ordered the other defendant, the State of Illinois, itself to provide the funds for the construction of the sewage disposal works and to execute the decree of April 21, 1930. It, rather than the Sanitary District, said the Court, was the "primary and responsible defendant", the Sanitary District being merely the instrumentality created and maintained by the State of Illinois for the accomplishment of its object. Every act of the Sanitary District relating to the diversion derived its authority and sanction from the State of Illinois and was directly chargeable to it. The wrong which the diversion had caused must be stopped and the duty of stopping it rested upon the State. The responsibility for raising the money necessary to remove the excuse for continuing the wrong was upon the State. Despite existing economic difficulties, the State had adequate resources and it was impossible to believe that it could not devise the necessary financial measures to enable it to protect its own people and to fulfil its obligations to its sister States. It was therefore "required" to take all necessary steps for raising the necessary funds for the completion of adequate sewage disposal plants and sewers, together with controlling works "so as to preclude any ground of objection on the part of the State or any of its municipalities to the reduction of the diversion of the waters of the Great Lakes—St. Lawrence system or watershed—to the extent, and at the times and in the manner, provided in this decree". Compliance with the order may require an appropriation of the necessary funds by the State legislature. If it refuses to make the appropriation, a conflict will be raised between the State of Illinois and the Federal Supreme Court the outcome of which will be awaited with interest.

(The history and nature of the controversy growing out of the diversion are

discussed by Professor H. A. Smith in this *Year Book* for 1929 pp. 144 ff., by Dealey in the *American Journal of Int. Law* for April 1929, pp. 306 ff., and by the author of this note in *ibid.*, October 1928, pp. 837 ff.)

JAMES W. GARNER.

UNITED STATES DISTRICT COURT

CLAIM OF PRIVILEGES UNDER BRITISH-AMERICAN LIQUOR TREATY BY NATIONAL OF THIRD STATE ON BASIS OF MOST-FAVOURED-NATION CLAUSE

In the case of the *Yalu* (4 F. Supp. 74) the United States District Court for the Southern District of Alabama held that the privileges of the so-called liquor treaty between Great Britain and the United States which substitutes the rule that vessels carrying cargoes of intoxicating liquor and endeavouring to enter the United States, may be seized at any place within one hour's run from the coast, in the place of the 12-mile rule as provided in the statutes, cannot be claimed by the nationals of another state under the usual most-favoured-nation clause in a treaty of commerce and friendship between such state and the United States. The essential facts in this case were that a motor-boat laden with liquor had been arrested by an American revenue cutter within 12 miles of the Louisiana coast, on the charge of violating the customs laws of the United States. The owner, a national of Honduras, invoked the benefit of the one hour's sailing rule in the liquor treaty with Great Britain referred to above, basing his claim on the most-favoured-nation clause in a treaty between the United States and Honduras. This treaty contained, in addition to various stipulations concerning personal and property rights of the respective nationals of the contracting parties, freedom of commerce and navigation, &c., the provision that no higher duties should be laid on imported goods from either contracting party than were levied on goods from any other country and that any advantage extended to the goods of any other country should be extended to like articles imported from the other high contracting party.

The court held that the provision of the Hondurean-American treaty relative to duties on imported goods was intended to apply only to goods legitimately imported; that the British-American liquor treaty contained no provision in regard to the importation of liquor into the United States for the purpose of sale or consumption therein; and consequently the owner of a Hondurean vessel engaged in smuggling liquor into the country in violation of its customs laws was not entitled to claim under the most-favoured-nation clause a privilege which could not be brought within the purview or intention of this clause.

JAMES W. GARNER.

CITIZENSHIP IN CANADA

One of the most difficult problems that Canadian administrative officials and courts have to deal with to-day, and one that has occasioned a good deal of heart-burning in the past in the British Isles and elsewhere, is the vexed question of "Canadian citizenship". This is due to the fact that there are on our statute books three laws,[1] all dealing with one or other aspect of this matter; all passed

[1] An Act respecting British Nationality, Naturalization, and Aliens. R.S.C. 1927. Cap. 138 and amendments. The Immigration Act. R.S.C. 1927. Cap. 93. Canadian Nationals Act. R.S.C. 1927. Cap. 21.

at different times and for different purposes; and all of which seem to have ignored the provisions of the others.[1]

The first of these is the law defining British Nationality and providing for Naturalization, which is to-day embodied in the Naturalization Act of 1914 and its amendments. Under this act, persons are born British subjects, or acquire this status by naturalization or marriage. They may also lose their status of British subject by marriage under certain conditions, by becoming naturalized in another state, or by having their naturalization papers cancelled or revoked. It is this last case which has caused most of the difficulty, but before dealing with it, it is desirable to look at the two other statutes.

The Immigration Act exists, in no small measure, to keep people who are considered undesirable out of Canada, and to assist in having them deported when they get in. In it a Canadian citizen is defined as:

(i) a person born in Canada who has not become an alien;

(ii) a British subject who has Canadian domicil;

(iii) a person naturalized under the laws of Canada, who has not subsequently become an alien or lost Canadian domicil; Canadian domicil can only be acquired by a person having his domicil for at least five years in Canada, and may be lost

1. by a person voluntarily residing out of Canada with the present intention of making his permanent home out of Canada;
2. or by a person belonging to one of the prohibited or undesirable classes within the meaning of the act, and for the purposes of the act.

Any Canadian citizen who is a British subject by naturalization, or any British subject not born in Canada but having Canadian domicil, shall be presumed to have lost his Canadian domicil[2] and shall cease to be a Canadian citizen if he has resided for one year outside of Canada.

The Canadian Nationals Act was passed in 1921 to enable Canada to nominate candidates for election to the Permanent Court of International Justice at The Hague. It defines a Canadian national as follows:

(i) Any British subject who is a Canadian citizen within the meaning of the Immigration Act;

(ii) The wife of any such citizen;

(iii) Any person born out of Canada whose father was a Canadian national at the time of that person's birth.

Appropriate provision is made for the renunciation of Canadian nationality in certain cases.

From an examination of these acts, it will be seen that Canadian nationals born out of Canada are not Canadian citizens, for they do not have Canadian domicil, and under the terms of the Immigration Act may be prohibited from landing in Canada. Difficulties of this kind occur most frequently in the case of missionaries and others, whose business or profession requires them, or more particularly their parents, to live abroad. In such cases, the Immigration authorities deal with the situation under their discretionary powers.

[1] See too Professor W. P. M. Kennedy's study on "The Law of Nationality", King's Printers, Ottawa, 1930, prepared for the Government of Canada.

[2] Canadian domicil can only be acquired for the purposes of the Immigration Act, by a person having his domicil for at least five years in Canada after having been landed therein within the meaning of the Act.

In the case of British subjects who acquire Canadian citizenship by five years' residence in Canada no particular difficulty is experienced, save that they may lose this citizenship and thus be denied readmission to Canada if they have resided outside Canada for a year or more. In the event of the country to which they have gone wishing to deport them, hardship sometimes occurs, for as Canada refuses them readmission and as they are still British subjects, they are sent back to Great Britain despite the fact that they may have left that country at an early age and have had no connexions with it thereafter. It is conceivable, too, that British subjects from other Dominions may be sent to Britain where they have never resided, in the event of their being refused entry to the Dominion of their origin. For a number of years any British subject, not born or naturalized in Canada, was in certain circumstances, as defined in the Act, subject to deportation to Great Britain regardless of the length of time he had resided in Canada. But this unfair provision was amended in 1928 and now a British subject by birth who has acquired Canadian citizenship cannot be deported.

Aliens who have become naturalized British subjects in Canada may, of course, have their naturalization certificates revoked for the usual causes. In addition, they may lose their Canadian citizenship by one year's residence outside Canada, as stated above. But this does not mean that they cease to be British subjects and if the country, to which they have gone from Canada, wishes to deport them, the Canadian authorities having refused to readmit them, they go back to Great Britain, which has never seen them before and incidentally had no voice in making them British subjects.

In addition to the difficulties indicated above there is the further one arising out of the fact that the North American Indian and persons of Asiatic or Oriental race (Chinese, Japanese, Hindus, &c.), although they may be Canadian citizens and British subjects by birth or naturalization, are on a different footing, in respect of the franchise, membership of certain professions and other civil rights, from the rest of Canadian citizens.[1]

NORMAN MACKENZIE.

[1] For a fuller treatment of this topic see "The Legal Status in British Columbia of Residents of Oriental Race and their Descendants" by Professor H. F. Angus, *Canadian Bar Review*, Vol. IX, pp. 1 *et seq.*

DECISIONS, OPINIONS, AND AWARDS OF INTERNATIONAL TRIBUNALS

JUDGMENT OF THE PERMANENT COURT OF INTERNATIONAL JUSTICE

JUDGMENT DELIVERED DECEMBER 15, 1933[1]

Appeal from the Hungaro-Czechoslovak Mixed Arbitral Tribunal

THIS case was brought before the Court by the Czechoslovak Government under Article X of Agreement No. II signed at Paris on April 28, 1930, for the settlement of questions relating to the agrarian reforms in the Succession States, which gives to Czechoslovakia, Yugoslavia, and Roumania, on the one hand, and Hungary, on the other, a right of appeal to the Permanent Court of International Justice from judgments on questions both of jurisdiction and merits rendered after the date of the Agreement by the Mixed Arbitral Tribunals set up under the Treaty of Trianon. The judgment appealed from in the present case was delivered by the Hungaro-Czechoslovak Mixed Arbitral Tribunal on February 3, 1933, in a suit between the Royal Hungarian Peter Pázmány University of Budapest and the Czechoslovak State, in which the University, relying upon Articles 246 and 250 of the Treaty of Trianon, claimed the restitution of certain landed estates in Slovakia which had been taken possession of and retained by the Czechoslovak Government. The Mixed Arbitral Tribunal decided (*a*) that it had jurisdiction to take cognizance of the claim; and (*b*) that the Czechoslovak Government must restore to the University the immovable property claimed freed from any measure of transfer, compulsory liquidation, or sequestration.

In its appeal to the Permanent Court the Czechoslovak Government disputed the correctness of this judgment on both points.

The University originated in the endowment by Cardinal Pázmány, Primate of Hungary, in 1635, of a "University of Studies" at the Jesuit College of Nagyszombat. In the course of time the foundation became an independent University, fostered and endowed by successive Hungarian sovereigns, and in 1777 it was transferred to Budapest. The estates now in question were bestowed upon it at various times in the past by valid instruments of title.

Article 250 of the Treaty of Trianon provides that "the property, rights and interests of Hungarian nationals situated in the territories which formed part of the former Austro-Hungarian Monarchy shall not be subject to retention or liquidation in accordance with" Article 232 and the Annex to Section IV. "Such property, rights and interests shall be restored to their owners free from any measures of this kind, or from any other measure of transfer, compulsory administration or sequestration taken since November 3, 1918, until the coming into force of the present Treaty."

"Claims made by Hungarian nationals under this Article shall be submitted to the Mixed Arbitral Tribunal provided for by Article 239."

The Court observed in its judgment that it did not feel called upon to deal separately with the question of the Mixed Arbitral Tribunal's jurisdiction and

[1] Series A/B, No. 61. The Court's publications can be obtained from the English agents, Allen & Unwin, Ltd., 40 Museum Street, London, W.C. 1.

of the merits. The Court would examine whether the conditions required by Article 250 were fulfilled and would then proceed to draw the necessary inferences for the decision of the case.

The first condition was that the claim must be submitted by a Hungarian national. In the light of Article 246 of the Treaty it is plain that this expression includes juridical persons as well as individuals, and most of the argument on this part of the case was directed to whether the University was a juridical person. The Czechoslovak Government contended that even if the University was, at some period in its history, a juridical person it lost that status as a result of its "nationalization", a process which commenced in the time of Queen Maria Theresa and has continued by successive stages, with the effect of merging the University's personality, in law, in that of the Hungarian State. The Court rejected this contention on consideration of the various charters, instruments, and laws relevant to the question. These showed conclusively that although the University was placed under State supervision it possessed and had never lost a personality in law—namely, the capacity to be the owner of movable or immovable property, to receive legacies or donations, to conclude contracts, &c. The University being a juridical person, its status as a Hungarian national, within the meaning of Article 250, was beyond doubt.

The Czechoslovak Government also argued that the property belonged not to the University but to another juridical person called the "University Fund", but the Court held that the existence of such a distinct juridical person had not been proved. The fact that the University Fund was entered as owner in the land registers was immaterial inasmuch as the Hungarian Government had shown that the terms "University Fund" and "University" are used interchangeably without distinction whenever the University *quoad* holder of property rights is intended.

The next point taken was that Article 250 does not protect *all* the property, rights, and interests of Hungarian nationals, but only *private* property, rights, and interests. The Court observed that this distinction is neither recognized nor applied by the Treaty of Trianon, as shown by Article 191 in particular, which provides for the transfer *ipso facto* to the Succession States of the property in their territory of the Hungarian Government and Crown and the private property of members of the former Royal family. This enumeration is based not upon the public or private nature of the property, but solely on the category of persons to whom it belongs. All other Hungarian property constitutes property, rights and interests of Hungarian nationals. The Treaty as such does not affect the ownership of such property, rights and interests, and effects no transfer.

The Court's judgment then proceeds to deal with the main question of merits, whether the measures applied to the University's property by the Czechoslovak Government fall within the scope of Article 250 and whether, consequently, they should be revoked and the property restored.

In November 1918, at the time of the occupation of Slovakia by the troops which had become Czechoslovak, the new authorities laid hands on the property of the University in the same way as on other property which they regarded as Hungarian. On August 11, 1919, an Ordinance was passed for the compulsory administration of certain ecclesiastical property and this was in fact applied to the estates in question, with the result that the Commission set up under the Ordinance took over the control of the property and the disposal of the revenues

thereof. Compulsory administration is one of the measures the withdrawal of which is prescribed by Article 250 of the Treaty. The Czechoslovak Government did not dispute this, but argued that the Treaty only requires such measures to be revoked if, and in so far as, they involve an element of discrimination, i.e. if, and in so far as, they have been taken in respect of property belonging to Hungarians by reason of their Hungarian nationality.

The Court in dismissing this argument observed in the first place that the Hungarian Agent had shown that the measures taken here were in fact of a definitely discriminatory character, and he had not been contradicted by the Czechoslovak Agent. This made it unnecessary to raise the question whether discrimination is essential to justify the application of Article 250. The Court, however, observed that Article 250 does not make discrimination a necessary condition in regard to any of the measures to which it refers. Moreover, the Court referred to the opinion expressed by it in previous cases that a measure prohibited by an international agreement cannot become lawful simply because the state concerned also applies the measure to its own nationals.

The Czechoslovak Government placed reliance upon Sir Austen Chamberlain's well-known report to the Council of the League in 1927 regarding the Hungarian Optants dispute. As to this, the Court remarked that the report, which aimed at settling, on the basis of Article 11 of the Covenant, a particular dispute in which the presence of discrimination was not, as in this case, admitted, was not unanimously accepted by the Council, Hungary having refused her consent.

In these circumstances, the Court concluded that the measures applied to the University's estates as early as 1918–19 by the Czechoslovak Government and maintained after the coming into force of the Treaty of Trianon were in the nature of compulsory administration or supervision within the meaning of Article 250, and therefore the University was justified in claiming the restoration of its property freed from all these measures.

A number of further arguments of a subsidiary character were put forward by the Czechoslovak Government and rejected by the Court, which do not appear to call for special notice in the present report.

In the result the Court by 12 votes to 1 affirmed the judgment appealed against. M. Hermann-Otavsky, Judge *ad hoc*, delivered a dissenting opinion.

ALEXANDER P. FACHIRI.

AWARD OF THE AMERICAN-EGYPTIAN ARBITRAL TRIBUNAL IN THE CASE OF GEORGE SALEM

Nationality—Exhaustion of local remedies—Rights under unilateral treaties—International responsibility of states for acts of judicial authorities.

By a protocol of January 20, 1931, the Governments of the United States and Egypt agreed to submit to an arbitral tribunal a claim of the United States on behalf of George Salem against the Government of Egypt for an indemnity amounting to 211,724 Egyptian pounds for damages sustained by Salem on account of an alleged denial of justice and for a violation of treaty rights of the United States. The arbitral tribunal was composed of an American and an Egyptian commissioner, with Dr. Walter Simons of Germany as President. Under the terms of the protocol the tribunal was authorized to determine whether under the principles of law and equity the Government of Egypt was liable in damages to the United States on account of treatment accorded to Salem, and in

case it should find the Egyptian Government so liable, to determine what amount the Egyptian Government should pay the United States in full settlement of such damages. The award of the tribunal was rendered at Berlin on June 8, 1932. Several interesting questions of international law were involved in the case. One of these related to the jurisdiction of an arbitral tribunal to determine the nationality of the claimant when his nationality is a matter of dispute, and as to the right of the respondent state to impeach before such tribunal the validity of a naturalization certificate issued to one of its own citizens by the complainant state. On two occasions the United States Department of State appears to have held that a presumption of expatriation because of his residence abroad had arisen against Salem under the Act of Congress of March 2, 1907, which carried with it his loss of the right of protection but not of his nationality. From first to last, the United States continued to recognize him as an American citizen even when it no longer recognized his right to protection, and for this reason it espoused his claim to an indemnity against the Egyptian Government. Moreover, the protocol for the arbitration of the claim referred to him as an "American citizen". This, according to the contention of the United States, settled the matter of his nationality and the question could not therefore be raised before the arbitral tribunal. The Egyptian Government, however, maintained that Salem had obtained his naturalization certificate from the United States fraudulently, as shown by his long residence thereafter in Egypt and his periodic returns to the United States merely for the purpose of obtaining a renewal of his American passport and for recovering his right of protection. It also contended that even if it were established that Salem was an American citizen, he was at the same time also an Egyptian citizen and consequently could not under a well-recognized rule of international law maintain a claim before an international tribunal against the Egyptian Government.

As to the contention of the United States that the reference in the protocol of arbitration to Salem as an American citizen was an admission by the Egyptian Government that he possessed American nationality and that in consequence the question of his nationality could not be raised before the tribunal, it held (the American commissioner dissenting) that if the "grammatical construction" alone of the language used in the protocol were taken into account, the American contention would have to be admitted, but this was not decisive of the matter and therefore the tribunal would have to decide on the basis of other considerations, such as the diplomatic correspondence between the two governments relative to his nationality, what was the real intention of the parties. An examination of this question, it declared, was not "impeded by the principle of international law that every sovereign state is, generally speaking, sovereign in deciding the question as to which persons he will regard as his subjects". And it added: "In the present case it should be ascertained whether one of the Powers, by bestowing the citizenship against general principles of international law, has interfered with the right of the other Power, or if the bestowal of citizenship is vitiated because it has been obtained by fraud." The tribunal further observed (Commissioner Nielsen dissenting) that while it was generally admitted that "every person of age is entitled to choose his nationality", this does not mean that his state of origin cannot make his acquisition of a foreign nationality dependent upon his obtaining the permission of his government so to do, nor does it mean that his government may not contest the right of another state to bestow its

nationality upon such person. In particular, the tribunal could not ignore the provision of Turkish law which makes acquisition by a Turkish national of a foreign nationality dependent on permission of the Turkish Government. This view, in general, is contrary to the traditional attitude of the United States and was vigorously denied by the American commissioner in his dissenting opinion. On the other hand, the tribunal admitted that when a person naturalized abroad returns to and resides in his original country the latter is not entitled under international law to maintain that its claim on such person takes precedence "in justice" over the claim of the naturalizing state. Therefore the claim of the Egyptian Government based on what it called the principle of "effective nationality", resulting from Salem's residence in Egypt subsequent to his naturalization in the United States, although that principle was upheld in the *Canevaro* case, was not sufficiently established in international law to entitle it to recognition as such. But, the tribunal added, the principle is well established that where a person possesses the nationality of two countries neither may maintain a claim in behalf of such person against the other. Accordingly, if the Egyptian Government could establish that Salem was an Egyptian national at the time he obtained American nationality and that he acquired the latter nationality without the express consent of the Egyptian Government, it would not need to invoke the principle of "effective Egyptian nationality" as a bar to Salem's claim against it. This, in the opinion of the tribunal, the Egyptian Government was not able to do. On the contrary, the tribunal found that Salem was a Persian rather than an Egyptian national at the time of his naturalization in the United States, because his father was a Persian subject, and under Persian law a child born of a Persian father, regardless of where he is born, is a Persian national. The Egyptian Government, being that of a third state, could not therefore contest the jurisdiction of the tribunal to hear a claim against it on behalf of one who was both an American and a Persian national.

As to the contention of the Egyptian Government that Salem's American nationality had been fraudulently obtained, and the American contention that it was not within the competence of the Egyptian Government to impeach before an international tribunal the validity of a naturalization certificate issued by the American Government, that being a matter solely within the jurisdiction of the proper American authorities, the tribunal held that the American contention could not be sustained before an international tribunal. Nevertheless it held that the Egyptian Government had failed to establish by proof its claim that Salem had acquired American nationality by fraudulent methods. The fact that the sort of life he led between 1909 and 1919 seemed to show that he had an intention of residing permanently in Egypt was counterbalanced by evidence of his intention to settle finally in the United States. In any case, it could not be said that the motives which led him to seek American nationality indicated fraudulent intention. The tribunal added that in a case like this, where the naturalizing state itself considers as valid an act of its own authorities, it must exercise "the greatest caution" in giving a decision on a claim involving a denial by another state of the validity of such an act, and should resolve the doubt, in case there be one, in favour of the validity of the act.

Another question involved in the case was as to the duty of a claimant to exhaust the local remedies available, before an international tribunal may take jurisdiction and hear his claim. The Egyptian Government contended that

Salem had not done this, in that he had failed to avail himself of the right of *recours en requête civile* against the decision of the Mixed Court of Appeal of Alexandria which had denied his claim to compensation for the alleged damages which he sustained. The American Government, on the other hand, argued that this objection could not be raised, since the arbitration agreement had conferred on the tribunal exclusive jurisdiction to hear the claim and had not made the exhaustion of local remedies a condition of the exercise of such jurisdiction. The tribunal, however, rejected the American contention on the ground that "international arbitral tribunals have repeatedly acknowledged that the conclusion of an arbitration agreement involves no abandonment of the duty [of the claimant] to exhaust all legal means". In support of this view it cited the award of the American-British Mixed Claims Commission under the agreement of August 18, 1910, in the case of the Canadian claim for a refund of certain customs duties (Nielsen's Report, *American and British Claims Arbitration*, p. 347). The opinions of various writers on international law were also cited in support of the tribunal's conclusion. Nevertheless, the tribunal held that since it was bound by the arbitral agreement to decide the questions submitted to it on the basis of equity as well as of law, the Egyptian contention that Salem had not exhausted the local remedies at his disposal was not, in its opinion, well founded.

A third point involved related to the right of the United States to rely upon the capitulatory treaty of 1830 between it and the Ottoman Empire upon the alleged violation of which by Egypt, as the partial successor of the Ottoman Empire, the United States based in part its claim on Salem's behalf. The Egyptian Government argued that, the treaty of 1830 being of a unilateral character, that is, one which conferred *rights* on the United States without imposing on it corresponding *obligations*, the United States could not under international law maintain a claim against Egypt for damages based on an alleged violation by the other party or its successor, of a one-sided agreement such as this. The tribunal, however, denied that there was any such rule of international law as that which the Egyptian Government pretended. In fact, as it pointed out, the treaty of 1830 was not purely unilateral in character since although it accorded to the United States the exclusive right to exercise through its consular authorities criminal jurisdiction over its own citizens on Turkish territory, it imposed on the United States the obligation to exercise that jurisdiction according to the same standard of efficiency as that maintained by the Turkish courts. The treaty was therefore really bilateral and not unilateral so far as the apportionment of rights and obligations between the parties was concerned.

A fourth point involved related to the status of the Mixed Courts of Egypt. The American Government contended that the treatment which Salem had received from these courts amounted to a denial of justice for which the Government of Egypt was responsible, on the theory that they were national and not international courts, and that it was for the arbitral tribunal to determine the amount which the Egyptian Government was under an obligation to pay the United States in satisfaction of the damages which Salem had sustained in consequence of such denial of justice. The Egyptian Government argued, on the other hand, that the Mixed Courts alone were competent to deal with claims for damages alleged to have been suffered by foreigners, and that they were in fact international courts, because they were created by international agreement, the judges

were appointed by the Egyptian Government from persons nominated by the foreign Powers and a majority of them were foreigners. Consequently the Egyptian State was not responsible for their decisions or errors of procedure. Their decisions were final and were not therefore subject to review by an arbitral tribunal. To this contention the American Government replied that the Egyptian Government had, by agreeing to submit the claim to arbitration, admitted the competence of the tribunal without regard to the alleged exclusive jurisdiction of the Mixed Courts. On this point the tribunal held that although the Mixed Courts had "a sort of international character" by reason of their special constitution and jurisdiction, it was "inclined to accept the general view of the Egyptian Government" that they had more of an international than a national character. Nevertheless, the tribunal thought it was justified in making an exception in this case and in going into the merits of the claim. Its conclusion was that certain of the allegations of the American Government with respect to the illegality, partiality, and excessive delays of the Mixed Courts in the trial of Salem were either not well founded or did not amount to a denial of justice, although it admitted that the Mixed Court at Cairo may have committed an error in applying article 776 of the *Code Civil Mixte*. But in any case it thought that the Egyptian Government could not be held responsible for the errors of judgment of the Mixed Courts, considering their quasi international character. If, it added, they were at fault, the Egyptian Government had no power to prevent such faults, since it could neither remove the judges nor punish them by disciplinary measures. The tribunal further added: "The responsibility of a state can only go as far as its sovereignty; in the same measure as the latter is restricted, that is to say, as the state cannot act in a free and independent manner, the liability of the state must also be restricted. Consequently the alleged denial of justice committed by the Mixed Courts cannot be brought forward against Egypt as a cause of complaint either to support the claim made in the name of George Salem or to prove the alleged violation of the treaty rights of the United States." For these reasons the Government of Egypt was not liable under the principles of law or equity for the payment of an indemnity to the United States on account of the damages suffered by Salem. From this conclusion Commissioner Nielsen dissented on the ground that the Government of Egypt was responsible under the established rules and principles of international law for the erroneous or unfair decisions of courts composed of judges who are appointed, paid and pensioned by it, and which apply Egyptian law. They are not, he argued, international but national courts for whose conduct the nation is as responsible as it is for the acts of other organs or authorities of the State. The conclusion of the tribunal on this point, it may be remarked, is criticized by an Italian jurist, Sotto Pintor, in an article entitled "L'Arbitrage Egyptien-Américain de 1931", published in the *Revue de la Société Royale d'Economie, de Statistique et de Législation*, t. XXIV (1933), especially pp. 564 ff. See also in the same sense an article by the author of this note entitled "Responsibility of States for Judgments of Courts", &c., in this *Year Book* for 1929, pp. 181 ff.

For a learned discussion of the status of the Mixed Courts of Egypt see the lectures of M. Salvatore Messina before The Hague Academy of International Law in 1932 entitled *Les Tribunaux Mixtes et les Rapports Interjuridictionnels en Egypte* (41 *Recueil des Cours*, pp. 367 ff.).

JAMES W. GARNER.

Jurisdiction of Arbitration Commission to rehear cases already decided by it

The *Year Book* for 1931 (p. 171) contained a note on the decision of the German-American Mixed Claims Commission in the so-called sabotage cases involving the responsibility of Germany for two fires which destroyed a railway terminal in the harbour of New York in July 1916 where a large quantity of munitions was stored awaiting shipment to the Allied Powers, and a munitions factory at Kingsland, New Jersey, in January 1917, containing an enormous quantity of shells. (*The Lehigh Valley Railroad Company* and the *Agency of the Canadian Car and Foundry Co.* and *various Underwriters*—Texts of the awards in *Amer. Journ. of Int. Law*, January 1931, pp. 147 ff.) The agent of the United States being dissatisfied with the decision that the evidence did not show that either fire was caused by acts of German agents and consequently that Germany could not be held responsible for the huge losses sustained by the claimants, filed petitions with the Commission for a rehearing of both cases. The reasons assigned by him in support of the petitions were that the Commission had "misapprehended the facts and committed errors of law". The petition having been dismissed, he later filed supplementary petitions based on the ground of newly discovered evidence. The American and German Commissioners being unable to agree, their disagreement was certified to the Umpire who rendered a decision (December 3, 1932) dismissing the petitions on the ground that the new evidence was not sufficient to change the original findings of the Commission. On May 4, 1932, the American Agent filed another petition for a rehearing in which he asserted that certain important witnesses for Germany had furnished "fraudulent, incomplete, collusive, and false evidence which misled the Commission and unfairly prejudiced the case of the claimants" and that there were certain witnesses in the United States who could give evidence which would establish the responsibility of Germany for the fires but whose testimony could not be obtained without authority to issue subpoenas and compel their attendance. The American Commissioner gave an opinion on the question in which he maintained that under the agreement for the arbitration of the claims, the Commission had an "inherent juridical right to determine for itself its jurisdiction to entertain a petition for the rehearing of the cases", and to revise in the light of new evidence any award which it may have made, whenever the ends of justice required it.

The German Commissioner maintained, on the contrary, that the Commission, being an international tribunal, had no such inherent power as that which the American Commissioner claimed for it, and that, in consequence, a reopening of the cases was permissible only if both parties to the arbitral agreement joined in conferring upon it that power. No such authority, he argued, had been given it by the agreement of 1922 under which the claim had been heard and decided. That decision was final and could not be reviewed even by a unanimous vote of the Commission including the Umpire.

The Umpire, Mr. Justice Roberts of the United States Supreme Court, being apprized of the disagreement between the German and American Commissioners, though not by a joint certificate of such disagreement, rendered a decision on December 15, 1933, holding, first, that the Commission undoubtedly had power to pass upon the extent of its own jurisdiction under the agreement of 1922, that is, to determine whether it had jurisdiction to hear a particular claim submitted

to it, and, second, that it was competent to reopen and hear any case in which it had made a decision, whenever there were good reasons for it. He did not, however, admit either the American contention that the power of the Commission was practically unlimited and that its doors were never closed to claimants until it had finished its work and disbanded, or the German contention that a decision once rendered was final and could never be reopened or reheard for any reason. Both views, he said, were extreme and neither represented the true construction of the Arbitral Agreement or a correct definition of the Commission's powers thereunder.

As to the circumstances under which a case could be justifiably reopened he said: "I think it clear that where the Commission has misinterpreted the evidence, or made a mistake in calculation, or where its decision does not follow its fact findings, or where in other respects the decision does not comport with the record as made, or where the decision involves a material error of law, the Commission not only has power, but is under the duty, upon a proper showing, to reopen and correct a decision to accord with the facts and the applicable legal rules." He added that it was his understanding that this had been repeatedly done by the Commission where there was palpable error in its decisions. The argument made on behalf of Germany that this had never been done except where the Agents of the two governments were in agreement on this point, and that consequently it was to be concluded that it could not be done against the opposition of either agent, the Umpire said he could not follow. However, he denied that the Commission had jurisdiction to reopen and reconsider an award on the basis of what is usually known as "after-discovered evidence".

But the petition of the American Agent was not based upon such evidence. His allegations, as stated above, were that certain witnesses who testified in behalf of Germany had furnished the Commission with "fraudulent, incomplete, collusive, and false evidence which misled the Commission and unfairly prejudiced the claimants' cases" and that certain witnesses now in the United States could give evidence which would convince the Commission that its decision was erroneous. Not having examined this evidence the Umpire refrained from expressing an opinion upon it. But in view of the seriousness of the charge that the Commission had been "defrauded and misled by perjury, collusion, and suppression" he thought it had not only the power but the duty to reconsider its decision. He added: "No tribunal worthy of its name or of any respect may allow its decision to stand if such allegations are well founded. Every tribunal has inherent power to reopen and revise a decision induced by fraud. If it may correct its own errors and mistakes, *a fortiori* it may, while it still has jurisdiction of a cause, correct errors into which it has been led by fraud and collusion." It is believed that this is the first reasoned opinion which has been given by an arbitrator on this point and it would seem that his conclusions were in accord with principles of justice and common sense and should commend themselves to jurists generally.

The case is now being reheard in pursuance of the Umpire's decision. In the meantime, Congress has passed an Act (approved June 7, 1933) authorizing the Federal Courts to issue, on application of the American agent, subpoenas to compel the attendance of witnesses whose testimony is desired in cases being heard by arbitration commissions. A somewhat similar Act had been passed in 1930 authorizing the members of such commissions to subpoena witnesses and punish

them for contempt, but unlike the Act of 1933 it did not give such power to government agents in charge of cases being heard by them. When the American agent in the present case called on the Commission to issue subpoenas in accordance with the Act of 1930 to procure the attendance of certain witnesses, the German Government objected that this was an extension of the power of the Commission and, since it refused to give its consent, the subpoenas could not be issued. (See the review of this legislation and of the reasons which led to it, by C. P. Anderson in *Amer. Journ. of Int. Law*, July 1933, p. 498.)

It may be remarked that shortly after the establishment of the Commission the German Government promulgated an ordinance (June 28, 1923) under which representatives of the Commission during its sessions in Germany might compel the testimony of witnesses, but this privilege was not allowed the American Commissioner or Agent. The Act of Congress of 1933 confers such powers on both the American Commissioner and its Agent in the United States, and in view of the German ordinance referred to, Germany could not justifiably object to such legislation, and so far has not done so.

JAMES W. GARNER.

DECISIONS OF NATIONAL TRIBUNALS INVOLVING POINTS OF INTERNATIONAL LAW

Decisions of the English Courts during the year 1933[1] involving points of International Law

The case of the "*Bathori*" (Case No. 1), which is digested in full below, is remarkable in the first place as being a claim in Prize commenced in the English courts in the year 1930 and decided on appeal by the Privy Council in 1933. It is probably the last Prize case to be heard arising out of the Great War. The case decides that, where an enemy merchant vessel, which has put into port before the commencement of hostilities, and leaves port after the commencement of hostilities under safe conduct to proceed to another destination, is sunk by a man of war of a belligerent Power, the sinking gives rise in international law to a claim for restitution and damages enforceable in the Prize Court, and also that, if the safe conduct has been given by a Power which in doing so purports to be applying Hague Convention No. 6, the claim can also be put on the ground of violation of this Convention. The case also raised a number of questions relating to the effect of certain articles in the Treaty of Peace of Trianon, because the vessel and the company which owned her were originally Hungarian, and the owners became "Fiumese" at about the time when the Peace Treaty came into operation, and later became Italian when Italian sovereignty was established over Fiume. The Privy Council decided that paragraph 2 of the Annex to Section IV of Part X of the Treaty, in barring claims against an Allied Power by or on behalf of any national of the former Kingdom of Hungary in respect of treatment of his property during the war, meant to cover all claims in respect of the treatment of property during the war which belonged to persons who then were Hungarian nationals, whatever their status at the time of the coming into operation of the Peace Treaty or at any subsequent date. As this provision of the Peace Treaty had been given the force of an Act of Parliament in the United Kingdom, the Prize Court could only apply it according to what it held to be its proper interpretation, and according to this interpretation it barred the claim. The Privy Council held that in the circumstances the Prize Court could not take into account (and it was therefore unnecessary for it to consider) the arguments of the plaintiffs to the effect that, at the date of the coming into force of the treaty, the owners had ceased to be Hungarian nationals and therefore the agreement of Hungary in the treaty that claims in respect of the treatment of the property of Hungarians should not be pursued, could not affect their rights, because Hungary could no longer deal with the rights of persons who were not then Hungarian nationals. On this question of international law, which the Privy Council found it unnecessary to deal with, it may be relevant to refer to the statement of the position with regard to claims under international law by the Permanent Court of International Justice in the *Mavrommatis* case.[2] The Court there said that when a state makes a claim in respect of an injury to its nationals, it is making a claim in respect of an injury contrary to international law done to itself in the person of its nationals. It would seem to follow from this that, when an act contrary to international law is done to an individual, the state which suffers the injury is that state whose national the individual was at the time of the injury, and it is to that state that the claim belongs. This view is, moreover, that which appears to have been generally adopted in the jurisprudence of international arbitral tribunals set up to deal with

[1] In general all cases reported in the English Law Reports for 1933 and in contemporary reports covering the same period are reviewed in this number of the *Year Book*, but a few cases which have already appeared in the reports for 1934 are included.

[2] *Publications of the P.C.I.J.*, Series A, No. 2, p. 11.

claims for injuries to individuals.[1] If the state to which the international claim belongs has waived it, then the other state is entitled to give effect to this waiver by such provisions in its municipal law or binding on its courts as may be necessary, and if the claim is otherwise one in respect of which a municipal remedy is open to the individuals concerned (e.g. as for instance in the present case in the Prize Court) to take away that remedy.

Case No. 1, The Bathori, [1933] P. 22 (Lord Merrivale P.); [1934] A.C. 91 (Privy Council).

In this case the plaintiffs, the owners, master and crew of the s.s. *Bathori* claimed in the Prize Court from the defendants, the Procurator General, representing the Crown, and Capt. Warleigh, R.N., damages for sinking of the *Bathori* on September 1, 1914, in the Atlantic 30 miles off Vigo in Spain in the following circumstances:

The *Bathori* was a vessel of the Austro-Hungarian mercantile marine, registered in Fiume, at that time a Hungarian port. Her owner was a company incorporated under Hungarian law with its principal office at Budapest and a business office at Fiume. On July 27, 1914, the *Bathori* left Mazarelli for Rouen with a mixed cargo consigned to merchants in France, and on August 5 reached Havre and there discharged her cargo in accordance with orders received from the French authorities. War was declared between the United Kingdom and France on the one hand and Austria-Hungary on the other hand on August 12. On August 28 the French naval authorities furnished the master of the *Bathori* with a document authorizing safe conduct to the vessel and her crew to proceed direct to Vigo, Spain, in ballast; this document was countersigned by the Consul for the U.S.A., acting for the Austrian Government, and by H.B.M. Consul-General at Havre. The vessel, being also furnished with all other necessary papers, left Havre for Vigo on August 29, carrying nothing in the nature of contraband. On September 1 the *Bathori* was stopped on the high seas by H.M.S. *Minerva* under the command of the defendant Warleigh, who sent an officer on board to whom the safe conduct and the other ship's papers were handed. By his orders the master and crew were taken on board the *Minerva*, and the *Bathori* was then sunk by gunfire from the *Minerva*. A protest and a claim in respect of the sinking of the vessel was made to H.M.G. by the U.S. Ambassador, on behalf of the Austro-Hungarian Government, and in a note in reply dated January 19, 1915, to the U.S. Ambassador, the Secretary of State for Foreign Affairs admitted that the sinking of the vessel was due to a misunderstanding and expressed regret and stated that the "question whether pecuniary liability attached to H.M.G. in the matter would be considered on the resumption of friendly relations between H.M.G. and the Austro-Hungarian Government and as part of the general settlement of claims on both sides which might then arise".

The status of Fiume at the outbreak of war was that of *corpus separatum* of the Hungarian Crown enjoying special privileges of local government. In October 1918, on the fall of the Habsburg dynasty, the Hungarian authorities left Fiume and the administration of the town was taken over in the name of the National Yugoslav Council of Zagreb, a body, formed to obtain independence for Yugoslav peoples in Austria-Hungary, whose activities led to the proclamation in December 1918 of the Kingdom of the Serbs, Croats, and Slovenes.

On November 3, 1918, an armistice was concluded between the Allied Governments and the Government of Austria-Hungary and under its terms Austro-Hungarian troops were to evacuate and Allied troops to occupy Austro-Hungarian territory up to a line defined therein, and the Allied troops were to occupy strategic points in Austro-Hungarian territory beyond the armistice line. Fiume was not within the armistice line, but was occupied by Italian troops as a strategic point on

[1] There are some decisions also holding it to be necessary that the individuals must still remain nationals of the claimant state.

November 17, 1918, and the Italian troops were joined by detachments of other Allied forces. An Italian national council replaced the Yugoslav council as the administration of Fiume, and, on September 12, 1919, the Italian, d'Annunzio, occupied the town. The Allied forces withdrew and d'Annunzio proclaimed himself dictator and remained in control until January 1921, when he was expelled by Italian troops.

On June 4, 1920, the Treaty of Peace between the Allied Powers and Hungary was signed at the Trianon, and on July 20, 1921, this treaty came into force on the deposit of the necessary ratifications. Under Article 53 of this treaty, Hungary renounced all rights and titles over Fiume and the adjoining territories and undertook to accept the dispositions made in regard to these territories, particularly as regards the nationality of the inhabitants, in treaties concluded for the purpose of completing the peace settlement. By a treaty between Italy and Yugoslavia signed at Rapallo on November 12, 1920, and ratified on February 2, 1921 (i.e. after the signature but before the coming into force of the Treaty of Trianon), the two parties recognized the independence of the State of Fiume. By notes dated February 14, 1921, H.M.G. recognized the provisions of the Treaty of Rapallo in so far as they related to the allocation of territories of Austria-Hungary not allocated by the Treaty of Peace. Difficulties arose, however, between Italy and Yugoslavia over the execution of the Treaty of Rapallo, and the boundaries of the State of Fiume were never delimited. A subsequent agreement was signed between them at Rome in January 1924, and ratified a month later, and by this agreement the sovereignty of Italy over Fiume was recognized by Yugoslavia.

As from April 20, 1920, the principal office of the plaintiff company was transferred from Budapest to Fiume and its registration at Budapest was cancelled: after this date the bulk of its capital was owned by, and its Board of Directors consisted of, citizens of Fiume or Italian nationals, and it became an Italian company under Article 15 of the Italian decree law of May 12, 1927, which provided that bodies with legal personality, including commercial companies, which had their head office in Fiume and whose incorporation was registered there, should be deemed to be Italian.

The Treaty of Peace of Trianon contains the following provisions:

(*a*) *Part VIII: Annex III* (*paragraph 1*):

"The Hungarian Government on behalf of themselves and so as to bind all other persons interested cedes to the Allied and Associated Governments the property in all merchant vessels belonging to nationals of the former Kingdom of Hungary."

(*paragraph 7*).

"Hungary waives all claims against the Allied and Associated Governments and their nationals in respect of the detention, employment, loss or damage of any Hungarian ships."

(*b*) *Part X: Section IV.*

Article 232 (I) (*b*).

"Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquidate all property rights and interests, which belong at the date of the coming into force of the present Treaty to nationals of the former Kingdom of Hungary, or companies controlled by them and are within the territories . . . of such Powers. . . .

"Persons who within six months of the coming into force of the present Treaty show that they have acquired *ipso facto* in accordance with its provisions[1] the

[1] *Vide* Article 61—under which every person possessing rights of citizenship (*pertinenza*) in territory which formed part of the territories of the former Austro-Hungarian monarchy obtains *ipso facto* to the exclusion of Hungarian nationality the nationality of the state exercising sovereignty over such territory: Article 62 qualifies 61 in respect of persons who acquired rights of citizenship after January 1910 in territory transferred

nationality of an Allied or Associated Power, including those who under Article 62 obtain such nationality with the consent of the competent authorities, or in virtue of previous rights of citizenship (*pertinenza*), will not be considered as nationals of the former Kingdom of Hungary within the meaning of this paragraph."

Annex: Paragraph 2.

"No claim or action shall be made or brought against any Allied or Associated Power or against any person acting on behalf of or under the direction of any legal authority or department of the Government of such a Power by Hungary or by any national of the former Kingdom of Hungary, wherever resident, in respect of any act or omission with regard to his property, rights or interests during the war or in preparation for the war. Similarly no claim or action shall be made or brought against any person in respect of any act or omission under it in accordance with the exceptional war measures, laws or regulations of any Allied or Associated Power."

(*c*) *Part XIV.*

Article 360.

"Without prejudice to the provisions of the present Treaty, Hungary undertakes not to put forward directly or indirectly against any Allied or Associated Power any pecuniary claim based on events which occurred at any time before the coming into force of the present Treaty. The present stipulation will bar completely or finally all claims of this nature, which will be thenceforward extinguished, whoever may be the parties in interest.

Under the Treaty of Peace (Hungary) Act, 1921, and the Treaty of Peace (Hungary) Order in Council, 1921, Article 232 of the Treaty of Trianon and the Annex to Section IV of Part X of the Treaty were given full force and effect as part of the municipal law of the United Kingdom, and the property, rights and interests, therein referred to, of nationals of the former Kingdom of Hungary situated (*inter alia*) in the United Kingdom were vested in the Administrator of Hungarian Property together with the right to sue to recover such property.

In September 1930, the plaintiffs commenced proceedings in the Prize Court claiming damages from the defendants on the ground that the capture and destruction of the vessel was wrongful and in contravention of the Hague Convention No. 6 of 1907 (Status of enemy merchant ships at outbreak of hostilities), Article 1 of which provided that where at the commencement of hostilities a merchant ship of a belligerent Power is in an enemy port it should be allowed to depart and proceed direct, after being furnished with a passport, to its port of destination or such other port as shall be named for it, and Article 3 provided that enemy merchant ships which left their last port of departure before the commencement of hostilities and are met with at sea while ignorant of hostilities must not be confiscated and that if they are requisitioned or destroyed an indemnity must be paid.

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to Yugoslavia or Czechoslovakia, and requires a permit. Articles 63 and 64 give certain rights of option.

In the case of Fiume, Article 53, already referred to, provided that Hungary should accept dispositions in regard to the nationality of the inhabitants in treaties to be concluded for the purpose of completing the peace settlement, and Article 10 of Annex F of the Agreements, signed at Nettuno in July 1925 and ratified in November 1928 between Italy and Yugoslavia to supplement the provisions of the Rome agreement of 1924 (under which Yugoslavia recognized Italian sovereignty over Fiume), provided that "natural or juridical persons who have acquired within six months from the date of the entry into force of the present Agreement the nationality of either of the High Contracting Parties shall be granted all the rights conferred by Article 232 of the Treaty of Trianon on nationals of the former Kingdom of Hungary, who acquired the nationality of an Allied and Associated Power, in accordance with the provisions and within the time limits laid down by the said Treaties". (N.B. The Nettuno Agreement is one between Italy and Yugoslavia only, though Article 53 may have the effect of requiring Hungary to accept it.)

It was contended on behalf of the defendants:

(i)[1] that the capture and destruction of the *Bathori* was not a contravention of Hague Convention No. 6, because the vessel had been allowed to proceed freely and her subsequent sinking was an "independent act of one of H.M. ships of war in lawful exercise of belligerent powers";

(ii) that, even if the plaintiffs had been (contrary to the preceding contentions) entitled to claim damages up to the time when the Treaty of Trianon came into force, this claim was now barred by the provisions of the treaty, Hungary still possessing sovereignty over Fiume until this treaty came into force:

(*a*) *Part VIII: Annex III: paragraphs 1 and 7.*

The *Bathori* was a Hungarian ship within the meaning of both paragraphs, and the plaintiff company was a national of the former Kingdom of Hungary within the meaning of paragraph 1. Consequently a claim for restitution of the *Bathori* was barred by paragraph 1, since the property in the vessel was ceded and a claim for compensation for her destruction was barred by paragraph 7.

(*b*) *Part X: Section IV: Annex: Paragraph 2.*

The plaintiff company was a national of the former Kingdom of Hungary within the meaning of this paragraph, and this claim, being a claim in respect of an act with regard to the property of such a national committed during the war, was consequently barred by this paragraph.

(*c*) *Part XIV: Article 360.*

The claim was a pecuniary claim against an Allied Power based on events occurring before the coming into force of the treaty, and was barred by this article, which extinguished such claim, whatever the parties interested.

(iii) that, even if the plaintiffs' claim was not barred under the provisions of the Peace Treaty, referred to in (ii) above, the claim was a property, right or interest situated within the United Kingdom and belonging at the date of the coming into force of the Treaty (July 26, 1921) to a national of the former Kingdom of Hungary within the meaning of Article 232 (*b*) of Part X of the treaty, and, as such, was subject to the charge created by the Treaty of Peace Order in Council in accordance with Article 232 and the Annex to Section IV of Part X of the treaty, and that by the said Order in Council the right to make the claim was vested in the Administrator of Hungarian Property, and that accordingly the plaintiff company had no right to put forward the said claim.

It was argued on behalf of the plaintiffs with reference to the contentions of the defendants summarized in (ii) and (iii) above:

A. That (i) the plaintiff company was a Fiumese corporation as from March 1920;

(ii) before the Treaty of Trianon came into force (July 1921) Hungary had ceased to possess any sovereignty over Fiume, and H.M.G. had (in February 1921) recognized the creation of Fiume as a separate sovereign state in accordance with the Treaty of Rapallo;

(iii) consequently Hungary had no power to affect the rights of the plaintiff company by any provisions of the Treaty of Trianon and they were not affected by these provisions.

B. *Alternatively,*

(i) that paragraph 7 of Annex III to Part VIII of the Treaty and Article 360 (Part XIV) of the Treaty only applied to claims by the Hungarian State and not to claims by individuals;

(ii) that the claim was not one in respect of the "detention, employment, loss or

[1] It was also contended on behalf of the defendants that the plaintiffs had precluded themselves by their *laches* (i.e. delay in instituting proceedings) from claiming the relief prayed by them. It was agreed, however, that this point should stand over till after a decision had been obtained on the other points.

damage of any Hungarian ship" within the meaning of paragraph 7 of Annex III to Part VIII.

(iii) that the *Bathori* was not at the date of the Treaty a ship, and therefore the property in her did not pass under paragraph 1 of Annex III;

C. That (i) the plaintiff company had become, as from April 16, 1920, a Fiumese corporation and had been as from 1927 an Italian corporation, and under Article 10 of Annex F of the Nettuno Agreements which came into force in 1928 the period of six months from the coming into force of the Treaty mentioned in Article 232 was extended, in the case of Fiumese citizens and corporations, to six months after the coming into force of the Nettuno Agreements (i.e. 1928), and consequently the plaintiff company was a person who had acquired "the nationality of an Allied Power" within the meaning of the second sub-paragraph of paragraph (*b*) of Article 232 of the Treaty and by virtue of that sub-paragraph was not to be deemed to be "a national of the former Kingdom of Hungary", and (ii) therefore was unaffected by paragraph 2 of the Annex to Section IV of Part X of the Treaty.

D. *Alternatively*,

Paragraph 2 of the Annex to Section IV of Part X only applied to claims in respect of action with regard to property, rights and interests of Hungarian or former Hungarian nationals situated in an enemy country, and did not apply here because the *Bathori*, when destroyed, was on the high seas, and if their claim for damages (which was disputed) was to be deemed to be a right or interest in the United Kingdom there was no action complained of, committed during the war or in preparation for war, with respect to this claim and consequently this paragraph did not apply; and

E. That this claim was not a property, right or interest charged and vested in the Administrator under the Order in Council, because (i) the plaintiff company was not a national of the former Kingdom of Hungary (see C (i) above); and (ii) the claim was not a right or interest situated in the United Kingdom.

F. *Alternatively*,

That the question whether the claim was affected by the charge created under the Treaty of Peace Order was not a matter for determination by the Prize Court, the effect of its provisions not being to affect the merits of the claim but only the machinery for the settlement.

Held by Lord Merrivale P.:

(i) That the unjustifiable sinking of an enemy ship which is sailing under safe conduct is an act which founds a claim in Prize for restitution with damages (The *Acteon* 2 Dod. 48; The *Troija*, 1 Spink. 342).

(ii) That consequently (subject to the effect of the Treaty of Trianon and the Order in Council) in the present case the plaintiffs were entitled, irrespective of the provisions of Hague Convention No. 6, to claim damages.

(iii) That H.M.G. in dealing with the *Bathori* had purported to act under the principle laid down in Article 1 of Hague Convention No. 6, and the subsequent sinking of the vessel by H.M.S. *Minerva* was an act of war committed by a commissioned officer of His Majesty in breach of an obligation accepted by the state under that Convention.

(iv) That the claim in Prize in respect of the sinking of the *Bathori* was a claim enforceable only in the United Kingdom and therefore must be considered to be property situated within the United Kingdom within the meaning of paragraph 1 (*b*) of Article 232 of the Treaty, and therefore if the plaintiff company could be deemed to be a "national of the former Kingdom of Hungary", within the meaning of that paragraph, the right to recover was subject to the charge created, and was divested from the plaintiff company by the Treaty of Peace Order in Council, in accordance with Article 232 and the Annex to Section IV of Part X of the treaty.

(v) That the plaintiff company must be considered to be a "national of the former Kingdom of Hungary" because at the date when the Treaty of Trianon was signed, June 4, 1920, no new sovereignty *de facto* or *de iure* had come into being in respect of Fiume (Fiume only became an independent state in July 1921 under the Treaty of Rapallo).[1] (He referred to the *Fama*, 5 Ch. Rob. 106; *U.S.* v. *Hayward*, 2 Gallison 485.)

On appeal to the Privy Council, the defendants did not challenge the decision of Lord Merrivale P. that the sinking of the *Bathori* must have given rise to a claim in prize.

Held by the Privy Council (Lords Atkin, Tomlin, and Thankerton):

(1) That the claim in prize of the plaintiff company was property situated in the United Kingdom within the meaning of Article 232 of the Treaty of Trianon and the Annex to Section IV of Part X of the Peace Treaty.

(2) That paragraph 2 of the Annex to Section IV of Part X, in referring to claims on behalf of any national of the former Kingdom of Hungary, was plainly intended to cover claims in respect of the treatment of property during the war belonging to persons who during the war were Hungarian nationals, as the plaintiff company was, whether or not such persons were still Hungarian nationals at the date the treaty came into force, and whether or not Hungary had under international law the power by the treaty to surrender the rights of, or claims in respect of the treatment of, persons who at the date of the treaty were not Hungarian nationals.

(3) That paragraph 2 of the Annex to Section IV of Part X of the Treaty had, by the Treaty of Peace Order in Council, made under the Treaty of Peace (Hungary) Act 1921, been given the force of an Act of Parliament of the United Kingdom, and the Prize Court must give effect to it according to its proper interpretation (i.e. see paragraph (2) above) and—that being so—the Prize Court could not consider the question which had been raised, whether under international law Hungary had the power by treaty to affect the particular claim of the plaintiff company; and it was also unnecessary for the court to determine what was the status of Fiume, when the treaty came into force, and what was in fact the nationality of the plaintiff company at that time, and whether or not the plaintiff company must be deemed to have acquired the nationality of an Allied or Associated Power in the manner provided in the last sub-paragraph of paragraph 1 (*b*) of Article 232 so as to take the property of the plaintiff company out of the scope of the charge created under paragraph 1 (*b*) of this article.

(4) That the plaintiff's claim was barred by paragraph 2 of the Annex to Section IV of Part X of the Treaty of Trianon.

Case No. 2 is an illustration (*a*) of the principle (already referred to in the *Year Book* in connexion with other cases, see *B.Y.B.*, 1931, p. 183) that a treaty is not part of the municipal law of the United Kingdom unless it has been made so by Act of Parliament (as many of the provisions of the Peace Treaties have, see Case No. 1 above), and (*b*) of

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[1] In an earlier passage of his judgment Lord Merrivale stated, after quoting Article 10 of Annex F of the Nettuno Agreements and referring to the fact that the plaintiff company had become an Italian corporation under the Law of 1927, that the plaintiff company was entitled to assert all the rights conferred by Article 232 of the Treaty of Trianon on nationals of the former Kingdom of Hungary who acquired the nationality of an Allied or Associated Power: but this finding is inconsistent with his decision that the rights of the plaintiff company were charged and divested under the Order in Council which puts this article into force in the United Kingdom, because Article 232 says that such nationals are not to be deemed to be nationals of the former Kingdom of Hungary for the purposes of paragraph (*b*) of the article. Query whether Article 10 of Annex F of the Nettuno Agreements extending the time provided by Article 232 is not *res inter alios acta* so far as the U.K. is concerned.

the principle that individuals cannot in the courts of the United Kingdom found claims on a treaty, although it may seem that they were intended to be benefited by it, unless it can be proved that the Crown or the other contracting power concluded it as agent or trustee for them, and that such a position is so anomalous that the clearest and most explicit evidence that it was intended by both the parties to the treaty would be required. This latter principle was laid down by the House of Lords in the *Civilian War Rights Case* (reviewed in the *Year Book* for 1932; see page 163). The present case is interesting because (*inter alia*) it gives further reasons why it should not be assumed that a treaty was concluded on the basis that one or other of the Powers acted as agent or trustee for its nationals.

Case No. 2. Administrator of German Property v. *Knoop*, [1933] 1 Ch. 439 (Maugham J.).

X, a German national, was entitled under a will proved in 1871 to certain moneys, which were in the hands of trustees in the United Kingdom, and on X's death in 1927 her interests passed to her three children, also German nationals. The Administrator of German Property commenced this action on March 7, 1931 for a declaration that these moneys were subject to the charge created (in accordance with Article 297 and the Annex to Section IV of Part X of the Treaty of Versailles) by Article 1 (xvi) of the Treaty of Peace Orders in Council 1919–24 on the property, rights and interests of German nationals situated in the United Kingdom at the date of the coming into force of the Peace Treaty. The defendants were the trustees and the three children of X.

By an agreement with the German Government signed in December 1929, the Government of the United Kingdom undertook (subject to certain conditions) to release from the charge created in pursuance of the Treaty of Versailles the property, rights and interests of German nationals in cases *where such property was not already liquid or liquidated or finally disposed of* on the coming into force of the agreement (Article 1). The Government of the United Kingdom retained its right to seize and liquidate this German property, but undertook to effect the release from the charge by retransferring the property to its owner (Article 2). This agreement came into force (Article 15) at the same time as the Hague Agreements of 1930 putting into effect the Expert's Plan of 1929 for the final settlement of financial questions between Germany and the Allies arising out of the war. The date of its coming into force was May 1930.

The defendants counter-claimed for a declaration that this money should be released in accordance with the agreement of December 1929. The dispute therefore arose out of that agreement and turned on whether this money was *liquid*, &c., within the meaning of the agreement, and therefore excepted from the release.

The Administrator contended that:

(*a*) this agreement had not (like the Treaty of Versailles) been given by the legislature the force of law in the United Kingdom;

(*b*) this agreement did not create any rights, on which the defendants as individuals were entitled to rely before an English court, being an agreement between the two Governments only, and not being concluded by the German Government as trustee for its nationals (*Civilian War Rights Association* v. *the King*, [1932] A.C. 149; *B.Y.B.*, 1932, pp. 163, 174) and that the court should not, therefore, assume jurisdiction to interpret the agreement;

(*c*) that the effect of the charge created by the Treaty of Peace Order in Council was to divest the property from the persons otherwise entitled to it and give the Administrator the right to retain and liquidate it without any right of redemption on the part of such persons (*Josef Inwald, &c.* v. *Pfeiffer*, 43 T.L.R. 399, 44 T.L.R. 355; *B.Y.B.*, 1928, p. 176) and that a conveyance or transfer would be necessary to restore the property to them.

The defendants contended that the German Government had concluded this

agreement as agent and trustee for the German nationals concerned and had made it part of the municipal law of Germany and that, therefore, they were entitled to rely on the agreement in the courts of this country.

Maugham J. gave judgment for the Administrator on the grounds indicated in (*a*), (*b*), and (*c*) above, expressing the view, with regard to the contention that the German Government had concluded the agreement of 1929 as agent or trustee for its nationals, that (i) there was nothing in the agreement indicating that the German Government had made this agreement in this capacity or that H.M. Government had accepted that position; (ii) such a position should not be assumed without an express statement, because (*a*) it would result in H.M. Government being bound to fulfil their obligations towards the German nationals, whether or not the German Government carried out the provisions of the Hague Agreements of 1930 which were the consideration moving H.M. Government to enter into the agreement of 1929; (*b*) the relation of trustee or agent for its nationals was not one which could ordinarily be assumed by a Government when concluding treaties; (*c*) there were no circumstances existing in this case to point to such a relation more strongly than those which existed in the case of the treaties which were under consideration in *Rustomjee's* case and the *Civilian War Rights* case where it had been held that no such relation existed.

Case No. 3, *Whittall* v. *the Administrator of German Property*, is an important decision on the second charge on German property, rights and interests created by paragraph (*e*) of Article 297 and paragraph 4 of the Annex to Section IV of Part X of the Treaty of Versailles, in relation to claims against Turkey, in the light of the special provisions of the Treaty of Lausanne with regard to claims, which are different from those in the other peace treaties. The second charge makes the proceeds of this German property liable to meet claims against Germany's allies in the war. These provisions of the Treaty of Versailles have been made part of the municipal law of the United Kingdom, and this fact explains why the individuals in this case were held entitled to rely upon them in the courts, and distinguishes this case from Case No. 2 above.

Case No. 3. Whittall v. *the Administrator of German Property* (Maugham J., November 11, 1932).[1]

In this case the plaintiffs sought a declaration against the Administrator to the effect that under Article 1, paragraph 16 (*b*), of the Treaty of Peace Order in Council, 1920, certain claims which they possessed against the Turkish Government in respect of their property, rights and interests in Turkey were entitled to the benefit of the second charge created under that article on the proceeds of the liquidation of German property in the United Kingdom.

The relevant portion of the Treaty of Peace Order, 1920, gives effect in the United Kingdom to Article 297 of the Treaty of Versailles and to the Annex to Section IV of Part X of the Treaty. Under Article 297 (*b*) of the Treaty, H.M. Government acquired the right to retain and liquidate all property, rights and interests in the United Kingdom, belonging at the date of the coming into force of the treaty to German nationals or companies controlled by them, and under paragraph (*e*) of Article 297 and paragraph 4 of the Annex, H.M. Government acquired the right to charge the proceeds of the liquidation of these German properties, rights and interests: (*a*) with the payment of certain claims against Germany, and (*b*) with the payment of claims by British subjects with respect to their property, rights and interests in the territory of other enemy Powers in so far as those claims were otherwise unsatisfied.

Effect was given to this charge by paragraph 16 of the Order in Council and the words of the Order in Council imposing the second charge are as follows:

"Secondly with payment of the amounts due in respect of claims by British nationals . . . with regard to their property, rights and interests in the territories of

[1] This important case appears never to have been reported.

Austria, Hungary, Bulgaria, and Turkey, in so far as those claims are not otherwise satisfied.

"Provided that, in particular, property, rights or interests so charged may at any time, if His Majesty thinks fit, be released from the charge so created."

The case therefore turned first upon the interpretation of sub-paragraph (*b*) of paragraph 16 of the Order in Council, and secondly, seeing that the provision of this sub-paragraph is a reproduction of corresponding words in paragraph 4 of the Annex to Section IV of Part X of the treaty and affects the amount of Germany's pecuniary liability under the treaty (since the surplus, if any, after the charge had been satisfied was, under the treaty, to be credited to Germany), on the interpretation of these provisions of the Treaty of Versailles.

The action was brought as a test case in order to obtain a decision on legal points affecting a number of cases, and the particular claims in respect of which the Plaintiffs sought the declaration may be divided into two classes: (*a*) claims in respect of the requisitioning of property of British subjects in Turkish territory between the beginning of the war and the date of the coming into force of the Treaty of Versailles, and (*b*) claims in respect of the destruction of property of British subjects in Turkey during the Graeco-Turkish hostilities which took place after 1920.

Some of the claims of the Plaintiffs in respect of their property in Turkey had been allowed by the Sumner Commission, a Commission set up by the Treasury of the United Kingdom to distribute a sum of 5 million pounds (in advance of reparation receipts from Germany) to British claimants for suffering and damage arising out of enemy action within the scope of Annex I to Part VIII of the Treaty of Versailles, and the Plaintiffs had received part-payment in respect of the claims so allowed, but this Commission in dealing with the claims did not purport to deal with them on a strictly legal basis.

Further, the Plaintiffs had received in respect of some of their claims certain payments from an international commission which had been appointed under the Paris Convention of November 1923 between the British Empire, France, Italy, Japan, and Roumania, which distributed to claimants, nationals of these Powers, in respect of the damage suffered in Turkey, certain sums (5 million pounds) which had been made available for this purpose under Article 58 of the Treaty of Lausanne, but not all the Plaintiffs' claims had been admitted by this Commission, and in any case the payments received were less than the amount of their claims.

The Plaintiffs now claimed, as regards the balance of their claims remaining unsatisfied after the payments received from the Sumner Commission and the International Commission, that they were entitled to participate in the second charge, created by paragraph 16 (*b*) of Article 1 of the Treaty of Peace Order, on the proceeds of the liquidation of property, rights and interests of German nationals in the United Kingdom.

It was not apparently disputed that the only claims which could participate in this charge were claims in respect of property, rights and interests taken or interfered with as the result of war measures and measures of transfer as defined in paragraph (*e*) of Article 297 of the Treaty and paragraph 3 of the Annex; but it was argued on behalf of the Defendant that the charge was further limited to claims by British nationals which were ascertained and determined as the result of the procedure provided for this purpose under the Peace Treaties with Austria, Hungary, Bulgaria, and Turkey respectively, and that therefore in the case of Turkey the claims to which the charge extended were confined to those for which the Treaty of Lausanne provided a method of settlement as against Turkey,[1] and did not extend to other claims against Turkey, particularly those which had been waived by H.M. Government under Article 58 of that Treaty.

[1] Viz. under Articles 65, 66, 69, 81, last provision of Article 89, and Articles 3 and 7 of Protocol 12 of the Treaty.

This contention of the Defendant was rejected by Maugham J. on the grounds that (*a*) at the time the Treaty of Versailles was drawn up, it was not known whether treaties of peace would be concluded with the other ex-enemy Powers and still less what provisions with regard to claims might be contained in these treaties; (*b*) the treaties with the other ex-enemy Powers were, as regards Germany, *res inter alios acta*, and a guarantee by Germany, as in substance the second charge was, should not, in principle, be deemed to be dependent upon subsequent arrangements between the creditor and principal debtor. The guarantor would be entitled to argue that there must be a condition of his liability that the amounts claimed under the guarantee were truly owed by the principal debtor.

It was argued on behalf of the Plaintiffs that the claims covered by this second charge were claims valid in International Law against Turkey, i.e. claims in respect of which H.M. Government was entitled to claim redress against the Turkish Government.

Maugham J. rejected this argument on the ground that it covered the wide category of claims which H.M. Government had renounced against Turkey under Article 58 of the Treaty of Lausanne (viz. pecuniary claims for loss and damages suffered by British subjects in Turkey between August 1, 1914, and the coming into force of the Treaty of Lausanne[1]), and it was impossible to hold that Germany under the Treaty was a guarantor of claims which Turkey failed to pay when Turkey's liability had been renounced by H.M. Government by treaty, and the word "claims" in the Order in Council must have the same meaning as the word in paragraph 4 of the Annex to Article 297.

The learned Judge held that the charge and the subsequent guarantee of Germany could only extend to claims which were legally valid and ascertainable, and it was not possible to regard these claims which had been waived as against Turkey as being so ascertainable. It could not, he held, be maintained that the findings of the Sumner Commission or of the International Commission, in so far as they had admitted some of the claims of the Plaintiffs, satisfied this condition, seeing that these commissions proceeded on moral rather than on strictly legal lines, and in any case neither Turkey nor Germany was represented.

He held, however, that it was possible to regard the charge as extending to claims by British nationals against Turkey (sc. whether waived internationally under Article 58 or not), in so far as such claims could be proved to be valid under Turkish municipal law at the date of the coming into force of the Treaty of Versailles. The words "amounts due" in paragraph 4 of the Annex meant amounts due at the date of the coming into force of the Treaty of Versailles and would not include claims arising out of the further hostilities between Turkey and Greece after the coming into force of that Treaty.

The claims of British nationals against Turkey whose validity under Turkish municipal law could be established would be claims in Turkish currency, and the question therefore remained as to the rate of exchange which should be adopted for the purpose of converting these claims in Turkish currency into sterling for the purposes of their participation in the charge. Since, as already stated, the words "amounts due" in paragraph 4 of the Annex mean amounts due at the date of the coming into force of the treaty, the rate of exchange for the purposes of conversion should be that prevailing on the date on which the Treaty of Versailles came into force.

On these grounds the learned Judge made the following declaration, and refused to allow costs to either party:

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[1] There is in the Treaty of Lausanne no article corresponding to Article 297 of the Treaty of Versailles and corresponding articles of other peace treaties, but only the more limited provisions of the articles referred to in the note on p. 181.

"This Court doth declare that by virtue of Article 1 (xvi) (*b*) of the Treaty of Peace Order, 1919, the Plaintiffs are entitled to the benefit of the second charge thereby conferred for securing the payment to them of the amounts due on the date of the coming into force of the Treaty of Versailles, then ascertained or thereafter to be ascertained, in respect of their claims against the Turkish Government existing on January 10, 1920, with regard to their property, rights and interests in Turkish territory, arising out of acts of the Turkish Government or its agents such as are defined as exceptional war measures or measures of transfer in paragraph 3 of the Annex to Part X, Section IV, of the Treaty of Versailles so far as such claims were when they arose recognized by Turkish municipal law as valid and if so and so far as such claims have not been or will not be otherwise satisfied.

"And this Court doth further declare that for the purposes of the said charge the amounts of the said claims respectively including claims in respect of requisitions ought to be ascertainable by reference to the sums in Turkish currency by which the Turkish Government might have satisfied the same on January 10, 1920, converted into English currency at the average rate of exchange prevailing on that day.

"And this Court doth further declare that in so far as such claims relate to requisitions the debts due by the Turkish Government in respect thereof become due at the date of the taking of the goods."

Case No. 4, *Barras* v. *Aberdeen Steam Trawling Co., Ltd.*, [1933] A.C. 402 (House of Lords), is a case turning on the interpretation of the word "wreck" in Section 1 (1) of the Merchant Shipping (International Labour Conventions) Act 1925, which was passed to give effect in the United Kingdom to certain conventions drawn up at a General Conference of the International Labour Organization and in particular to the convention concerning unemployment indemnity in case of the loss or foundering of a ship, and which gives a seaman, in cases where on account of a "wreck" his service is terminated before the date contemplated in his contract, the right to wages, if he is unemployed, for a period not exceeding two months from the date of termination. In this instance the vessel suffered slight injuries on account of a collision on her return voyage to port after fishing and was laid up for fourteen days. The seaman's services were terminated on the day of the injury and he was re-engaged fourteen days later. He claimed wages in respect of these fourteen days. The question was whether there was a "wreck" within the meaning of the Act. The Scottish Court of Session and the House of Lords held that, as the word "wreck" had been judicially interpreted by the English Court of Appeal in 1913 (*The Olympic*, [1913] P. 92) where it occurred in an earlier Act of Parliament also dealing with seamen's wages (Section 158 of the Merchant Shipping Act 1894), it must be assumed, in the absence of anything indicating a different meaning, to bear the same meaning in the present Act. The meaning given to the word in 1913 was damage to the ship rendering her *incapable of carrying out the maritime adventure in respect of which the seaman's contract had been entered into* (a sense very much wider than the ordinary meaning of the word, which implies the total destruction of the vessel) and the Scottish Court and the House of Lords applying this interpretation in the present case held that there was no wreck because the "maritime adventure" was here a succession of fishing trips and these, though interrupted for fourteen days as the result of the collision, were resumed. The argument that there was an indication of a different meaning in the present Act, in that the Act was passed to give effect to the International Convention which was scheduled in the Act, and in the Convention the words used were "loss or foundering", which clearly had a more limited meaning, was rejected on the ground that, while no doubt the intention of the Act was to do all that the Convention required, the object both of the Convention and the Act was to improve the position of seamen, and the adoption of the narrower meaning would take away from seamen rights which they previously enjoyed under the Act of 1894. The Act of 1925 as interpreted by the House of Lords fulfils the requirements of the Convention, but does more than the words of

the Convention require. In this respect this decision resembles the previous decision of the English courts on this same Act in the case of the *Croxteth Hall*.[1]

The three cases (Nos. 5, 6, and 7) which are digested immediately below are of the greatest importance in connexion with the question of payment of debts in the complicated situation now prevailing as the result of the abandonment by many countries of the gold standard, and the fluctuations in the relative value of the currencies. The principles which emerge from these cases seem to be the following. In the first place, there are always two distinct questions: (*a*) what is the amount or value of the debt? and (*b*) in what manner is payment to be made? The second question is governed by the law of the place of payment (*lex loci solutionis*) and depends upon the laws of that place with regard to legal tender. This principle was recognized in all three cases but is particularly clearly stated in the judgments of the House of Lords in the *Adelaide Electric Supply Company* case (No. 7). It is a principle which was also relied upon by the Permanent Court of International Justice in the case of the *Serbian Loans*.[2] The Court of Appeal in the *Feist* case (No. 6) (and the House of Lords, though they overruled the decision, in no way dissented from the Court of Appeal on this point) held that, where there is an obligation to pay in England a sum of money expressed in the money of the United Kingdom, payment can always be made in any form of currency which is legal tender by the law of the United Kingdom (including, therefore, at the present time Bank of England notes) and that any provision of the contract purporting to require payment in one particular form of legal tender, such as gold coins, to the exclusion of another, would be void and unenforceable by reason of the provisions of the Coinage Act of 1870.

The first and quite distinct question, as to the amount or value of the debt, is to be determined first of all by the terms of the contract under which the debt arises, and secondly by the "proper law of the contract"; that is to say, that law which, under the principles of private international law, is to be regarded as applicable for the purpose of determining the nature of the obligations which the parties have contracted to each other. The *Feist* case is of importance as being a judicial interpretation, now given by the highest tribunal in this country, of a form of "gold clause" which is to be found inserted in a very large number of contracts concluded in recent years. These gold clauses refer to gold coin of a certain country of the weight and fineness in use at a certain date, and, owing to the manner in which the bonds under consideration in this case (and probably in many other contracts) were drafted, there was considerable difficulty in determining whether the gold clause must be deemed to relate to the amount or valuc of the debt (i.e. the first question) or to the manner in which the payment was to be made (i.e. (*b*)). The House of Lords, differing from the Court of Appeal on this point, held that the gold clauses in these particular bonds must be interpreted as relating to the amount or value of the debt, and the reasons upon which this conclusion is based are likely to be applicable to a large number of similar contracts. On this interpretation of thc "gold clause", judgment was given that the debtor should pay a number of paper pounds equal in value to the number of gold pounds specified in the contract. Payment was to be made in England, and there has been no legislation in England, such as that recently enacted in the United States, making x number of paper pounds a valid discharge for a debt which is expressed as being of the value of x gold pounds. It would appear from the judgments of the House in the *Adelaide* case that in a case where this was the law of the place of payment, payment made in accordance with such law must be recognized by the English courts as a valid discharge, under the principle that the *lex loci solutionis* governs the mode of payment.

In the *Broken Hill* case (No. 5) and in the *Adelaide Electric Supply Co.* case (No. 7) another difficult question arose out of the facts that both Australia and the United

[1] [1930] P. 20, 197, and [1931] A.C. 120 (sub nom. *Ellerman Lines Ltd. & Murray*), *B.Y.B.*, 1931, pp. 183 and 198.

[2] *Publications of the Court*, Series A, No. 20, p. 41.

Kingdom employ money designated as pounds, shillings, and pence; both possess a gold currency composed of gold coins of exactly equal value, the United Kingdom coins being legal tender in Australia as well as Australian coins; both have laws making bank notes legal tender; and both have departed from the gold standard, with the result that there has been, since 1921, a difference of value, sometimes one way and sometimes the other, between the notes which are legal tender in the two countries. The relevant contracts created debts of so many pounds, and a vital question was whether, in the circumstances, there could be said to be an Australian pound as distinct from an English pound, so that it was first necessary to determine whether the amount of the debt was to be valued by reference to Australian paper currency or United Kingdom paper currency. The dates of the contracts for this purpose were 1920 and 1921 and there was considerable conflict of judicial opinion upon it. Three Lords Justices in the Court of Appeal in both cases, and Lord Wright in the House of Lords in the latter case held that the two "pounds" must be regarded as being separate for this purpose and that therefore this question of interpretation arose. Three Lords of Appeal in the latter case (Lord Atkin expressing no final opinion on this point) on the other hand held that in 1921 there could not be said to be a difference between the Australian and United Kingdom pound as a unit of account, and that therefore this question did not arise and there was only one question, namely the mode of payment and what was a valid discharge by the *lex loci solutionis*. (There is no decision on the part of the three Lords of Appeal who held that there was no difference in 1921, on the question whether there must be considered to be such a difference between the two pounds in interpreting contracts concluded at a later date.) Lord Wright and Lord Atkin held that, assuming there was such a difference, the question whether the amount of the debt must be measured by the Australian or the United Kingdom unit must, in the absence of any provision in the contract implying the contrary, be determined according to the law of the place of payment, and therefore by the Australian unit if payment is to be made in Australia, and there does not appear to be, in the other judgments delivered in the House of Lords, anything to indicate any disagreement with this view. As the place of payment in the *Adelaide* case was Australia, Lord Wright reached the same conclusion as the other members of the House, though, according to his view, there were two questions instead of only one to be decided. Lord Wright, although agreeing with the majority of the Court of Appeal in the *Broken Hill* case that the Australian pound must be considered to be a unit distinct from the United Kingdom pound, nevertheless held (as did Lord Hanworth M.R. in his minority judgment in the Court of Appeal) that their decision was wrong because payments to be made in London were there in question, and therefore the word "pound" should have been interpreted as being the United Kingdom pound and not the Australian pound.

Case No. 5. Broken Hill Proprietary Company, Ltd. v. *Latham*, 49 T.L.R. 137; [1933] 1 Ch. 373 (Maugham J., C.A.).

The B.H.P. Co. was incorporated in 1885 in Victoria in the Commonwealth of Australia. It had registered offices both in Melbourne, Victoria, and in London. In October 1920 the Company issued debentures of £100 each (secured by a trust deed under which certain persons in Australia were trustees), under which the Company covenanted to pay to the holders £100 and, until such payment, interest at £7 per cent. per annum. The register of debentures was to be kept at Melbourne and London and the Company undertook to set aside in each year the sum of £75,000 as a cumulative sinking fund to provide for the service of the debentures including their redemption (as and when drawn for redemption) at par. The interest and principal due on the debentures was payable at the option of the holder at any office of the Commonwealth Bank of Australia in Sydney, Melbourne, Adelaide, or London. At the time the debentures were issued there was no difference in value between the Australian pound and the pound sterling of the United Kingdom. Prospectuses

inviting subscription of the debentures were issued in Australia and London and the debentures were taken up in both countries though the greater number were taken up in Australia. On March 30, 1932, an Australian pound note (legal tender in Australia) was worth, according to the rate of exchange in London, only 16*s.* in the pound notes which were current in the United Kingdom. On this date the Company took out a summons in order to obtain the decision of the Court on the question whether, in those cases where the holders of debentures had exercised the option to be paid in London, the amounts due under the debentures for principal and interest were to be determined by reference to the value of the pound sterling of the United Kingdom or of the Australian pound, so that an allowance for conversion from Australian pounds should be made when the sums were paid in London in the currency of the United Kingdom. The Company contended that the debts under the debentures were debts in Australian currency, and that the currencies of Australia and the United Kingdom, although they had common units of measurement, were not in law the same in 1920 or in 1932.

The debenture holders contended that there was in 1920 and in 1932 complete identity between the pound current in Australia and that current in the United Kingdom. The debt was a debt of so many pounds, payable in gold or in what is legal tender for gold in the place of payment. The introduction of the United Kingdom currency notes and of Australian currency notes only affected the question of what was legal tender at the different places of payment.

Held by Maugham J.:

(1) The debentures were contracts to be construed according to Australian law.

(2) The Commonwealth of Australia had had, since 1900, full powers to make laws with respect to currency, coinage, and legal tender, and the Australian Coinage Act of 1909 made provision for the issue of Australian coins, the gold coins being of the same weight and fineness as the gold sovereign of the United Kingdom, and both United Kingdom sovereigns and Australian sovereigns were made legal tender in Australia; all contracts relating to money, unless made with express reference to the currency of some British possession or of a foreign state, were by that Act to be deemed to be made with reference to the money so declared legal tender (i.e. either United Kingdom or Australian sovereigns). Australian Acts of 1910, 1911, and 1920 provided for the issue of Australian notes, the last Act relating to the issue of notes by the Commonwealth Bank, these notes being made legal tender in Australia.

(3) A contract to pay money must be construed with reference to the legislation in force as to legal tender, and a contract made in 1920 to pay pounds was not *prima facie* a contract to pay gold but to pay according to the currency of the country where payment was to be made.

(4) There was in 1920 no such thing as an "Australian pound" as distinct from the pound sterling of the United Kingdom, so that it was not possible to construe the debentures as contracts to pay in Australian as distinct from United Kingdom currency, and therefore in making payments in London the Company must pay in legal tender of the United Kingdom the number of pounds specified in the debenture without any deduction on account of the depreciation of Australian currency.

Held by the C.A., Lawrence and Romer L.JJ. (Lord Hanworth M.R. dissenting):

(1) There was a clear distinction between the currencies of the United Kingdom and of Australia. They both employed a standard unit called pounds which when issued in gold coins represented the same value, but the notes which were legal tender in the two countries were different, though at the relevant times both were of less value than the standard unit in gold.

(2) A contract to pay so many pounds, unless it be a contract to pay in gold, is not a contract to pay so many coins but to pay so many units of value by tendering whatever is legal tender for that amount.

(3) If the pounds referred to in the contract were Australian standard units, then the obligations would be discharged by the payment of whatever is legal tender for that amount in Australian currency, and in the case of a payment in England, by the payment in English legal tender of an amount equal in value to the amount required in Australian currency at the ruling rate of exchange.

(4) The facts that the Company was an Australian company and that the trust deed, securing the debenture issue, was prepared and executed in Australia and created a charge over property situated in Australia *prima facie* indicated that the word "pounds" and the symbol £ in the debentures meant Australian pounds. This conclusion was reinforced by the considerations that:

(i) The provision giving the right to a holder to be paid in London did not state that he should be paid in sterling, and it was not a reasonable construction of the obligation to hold that an obligation to pay "£3 10*s*. 0*d*." meant one value if payment was made in London and another value if payment was made in Australia.

(ii) The yearly sum of £75,000 which the Company had to set aside as a sinking fund had to be paid in Australia and would be satisfied by the tender of Australian notes, and the debenture holder could only enforce his security in Australia where, if he brought proceedings, his claim would be satisfied by the tender of the amount in Australian notes.

(5) For these reasons the amounts due under the debentures must be held to be due in Australian pounds and could be paid in England by amounts in English legal tender equal in value at the ruling rate of exchange to the amounts of Australian legal tender required to discharge the obligations there.

Case No. 6. Feist v. *Société Intercommunale Belge d'Electricité*, [1933] 1 Ch. 684 (Farwell J., C.A.); 50 T.L.R. 143; 1934 A.C. 161 (House of Lords).

The Société Intercommunale Belge d'Electricité was a Company incorporated in Belgium, which issued for sale in September 1928 certain bearer Bonds. The plaintiff was a holder of one Bond for £100.

Under the provisions of the Bonds the Company undertook to pay to the holder (1) on the date when the principal became payable "the sum of £100 in sterling in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on September 1, 1928", and (2) interest (until redemption) at 5½ per cent. per annum "in sterling in gold coin of the United Kingdom", &c. There were other clauses: (3) stating that the Bond was one of an authorized issue of Bonds of an aggregate principal amount not exceeding £500,000 "in sterling in gold coin of the United Kingdom", (4) stating that the Bonds constituted a liability of the Company "in sterling in gold coin of the United Kingdom", and (5) stating that the Bond was to be construed and the rights of the parties regulated according to the law of England and that the parties submitted to the jurisdiction of the English courts. The words "Bond for one hundred pounds" were written in large letters across the Bond. The interest coupons made the interest payable at the office of a financial house in London.

The Company contended that it was entitled to pay in respect of interest and principal the nominal amount of the sums in sterling mentioned in the Bonds, in whatever might be legal tender in England at the time of payment.

The plaintiff contended that the payments must be made by tendering a number of gold sovereigns equal to the sums in sterling mentioned in the Bond or alternatively by tendering such sums in the notes which are legal tender in the United Kingdom as would be sufficient to purchase in the market at the day of payment gold equal in weight and fineness to the sums required in gold coins.

Held by Farwell J.:

(i) The question was primarily one of the construction of the Bond, i.e. (*a*) whether it created an obligation to pay £100, or (*b*) an obligation to pay such sum as

represents the value of 100 golden sovereigns of the weight and fineness of the gold sovereign of September 1, 1928.

(ii) It was impossible to construe the Bond in such a manner as to render all the wording of the Bond consistent—the words written across the Bond suggested interpretation (*a*), but this interpretation did not give full effect to the provisions in conditions (1) and (2). But interpretation (*b*) meant that the obligation was one to pay sums which both as to principal and interest were unascertainable till the moment of payment: the principal sum would not necessarily be £100, but might be a quite different sum, and this was inconsistent with the words written all over the document that it was a Bond for £100.

(iii) For these reasons interpretation (*a*) was the right one and provisions (1) and (2) of the Bond must therefore relate to the mode of payment and not to the quantum of the debt.

(iv) On this interpretation the bond created money debts for £100 principal and £2 15*s*. half-yearly interest, but provided in conditions (1) and (2) above that this debt must be discharged by payment in a particular form of legal tender and no other—i.e. in gold coins. (It was clearly not a bullion contract.) But neither in September 1928 nor at the present time could these gold coins be obtained, and a debt for a sum of so many pounds could always be satisfied by the tender of the sum in question in whatever had been made by the Legislature legal tender at the moment, even if the contract stipulated for a special form of legal tender.

(v) On these grounds judgment must be given for the Company.

On appeal to C.A.: the appeal was dismissed.

Lord Hanworth M.R. agreed with the judgment of Farwell J. and, in support of the conclusion of Farwell J. on point (iv) above, referred to Section 6 of the Coinage Act 1870; and also to Section 1 (1) of the Gold Standard Act 1925 and Section 1 of the Currency and Bank Notes Act 1928, which made Bank of England notes legal tender, unconditionally, in the same manner as gold coins were legal tender under the Act of 1870. He called attention to condition (5) above of the Bond, that its provision must be construed according to the law of England and stated that any other conclusion on this point would be contrary to these Acts of Parliament.

Lawrence L.J. also agreed, though he pointed out that the facts that gold coins were not current in 1928 and that there was no gold coin for less than 10*s*. and it was impossible to pay £2 15*s*. in gold coin, were grounds for coming to the opposite conclusion and for holding that conditions (1), (2), (3), and (4) of the Bond related to the quantum of the debt and not to the mode of payment.

Romer L.J. agreed and stated that the Coinage Act 1870 rendered illegal a contract which attempted to exclude the provisions of that Act as to legal tender.

On appeal to the House of Lords:

Held (per Lord Russell of Killowen):

(i) That the gold clauses in conditions (1) and (2) of the Bond were inserted in contemplation of the contingency of the United Kingdom going off the gold standard at some future time, and that neither party to the Bond could have contemplated payments under the Bond being made in gold coins, this being impossible, though this was the literal meaning of these clauses.

(ii) The literal meaning of the gold provisions in clauses (1) and (2) of the bond not being that intended, the proper course was to attribute some other meaning to them if that were possible and if such other meaning could be derived from the document, rather than simply to ignore them. He cited in support of this view a short passage from the judgment of the Permanent Court of International Justice in the Serbian Loans case.[1]

[1] *Publications of the P.C.I.J.*, Series A, No. 20, p. 32.

(iii) This other meaning could be discerned from conditions (3) and (4) of the bond, where the gold clause clearly and literally referred not to the mode of payment but to the measure of the company's obligation. The words written across the face of the bond, which had influenced the decisions of the courts below, formed no part of the contractual provisions but were only descriptive of the bonds.

(iv) Condition No. 1 must be construed as if it ran:

"pay . . . in sterling a sum equal to the value of £100 if paid in gold coin of the United Kingdom of or equal to the standard of weight and fineness existing on the 1st day of September 1928."

Condition No. 2 must be similarly construed.

(v) For these reasons the appeal should be allowed and a declaration given to the effect that the appellant, as holder of a bond, was entitled to receive such sum in sterling as represents the gold value of the nominal amount of each respective payment.

Case No. 7. Adelaide Electric Supply Co., Ltd. v. *Prudential Assurance Company*, [1933] 49 T.L.R. 224 (Farwell J.); [1933] 49 T.L.R. 422 (C.A.); [1933] 50 T.L.R. 147 (H. of L.).

The P.A. Co., a Company incorporated and having its head office in the United Kingdom, was the holder of preference stock of the A.E.S. Co., and was registered as such on the London register of the Company. The A.E.S. Co. was incorporated in 1905 in the United Kingdom with a registered office in London. Until 1921 the management of the Company's business was carried on in England; dividends were declared there and paid there in English legal tender. By resolutions duly passed in 1921 it was provided that all business of the A.E.S. Co. should be transacted in Australia, that all dividends should be declared at meetings held in Australia and should be paid in Adelaide, and no part of the profits should be transmitted to the United Kingdom except in payment of dividends to members ordinarily resident there.

Since March 1921 the A.E.S. Co. had paid its dividends by delivery of warrants to the nominal amount of the dividends payable at a Bank in Australia, and the P.A. Co.'s warrants were presented to this Bank and duly cashed for their nominal amount in Australian legal tender.

The standard unit of currency in both England and Australia was the pound and the dividends were declared in pounds, but the notes, which were legal tender in Australia for a debt in pounds, were at a substantial discount in relation to the notes which were legal tender in the United Kingdom.

The P.A. Co. claimed that they and all other holders of preference stock registered on the London register were entitled to be paid their dividends in England in English legal tender to the full nominal amount of such dividends in sterling. The A.E.S. Co. contended that the P.A. Co. were only entitled to the nominal amount of their dividends in Australian legal tender or, if payment were made in England, to an amount of English legal tender equal to their nominal amount in Australian legal tender at the ruling rate of exchange.

Held by Farwell J.:

(1) (Following the decision of the C.A. in the *Broken Hill Proprietary Co., Ltd.* v. *Latham*, No. 5 above) that the Australian pound and the United Kingdom pound were separate monetary units.

(2) That the A.E.S. Co., Ltd. was a United Kingdom Company and where the word "pound" was used in its prospectus or other documents the meaning was a United Kingdom pound.

(3) That the amount of the preference dividend to which the P.A. Co. was entitled was an amount in pounds of the United Kingdom.

(4) That (2) and (3) above were not affected by the resolutions of 1921 transferring the business to Australia.

(5) That the P.A. Co. was entitled to the nominal amount of its preference dividends in legal tender of the United Kingdom.

The C.A. affirmed this decision.

Held by the House of Lords (*per* Lord Warrington):

(1) The resolutions of 1921 transferring the business to Australia were valid and had the effect of modifying the original contract between the Company and its members.

(2) After the passing of these resolutions the dividends became payable in Australia and the payment was governed by the law of Australia (*lex loci solutionis*), and payment must be made in what was legal tender in that country and the obligation was satisfied by the payment there, in the legal tender of that country, of the number of pounds, shillings, and pence mentioned in the debentures. The Australian pound and the United Kingdom pound were not separate monetary units at the relevant date (January 1921), so that a contract in pounds should be regarded as one for payment of an amount expressed in Australian as distinct from United Kingdom pounds and the difference lay merely in what was legal tender in the two countries for debts in pounds, a matter that was governed by the *lex loci solutionis*; the judgment of Maugham J. in the *Broken Hill Proprietary Co.* v. *Latham* was correct and the judgment of the majority of the C.A. in that case should be treated as overruled.

(3) For these reasons the appeal should be allowed.

Lord Atkin, in agreeing that the appeal should be allowed, expressed the view that, though the Australian pound and the English pound were not the same to-day, they were the same at the material time (i.e. 1921) when both pounds were on the gold standard and possessed the same value, and he agreed that the decision of the C.A. in the *Broken Hill* case should be considered as overruled. If, however, he were strong on this point (on which he expressed no final opinion) he considered that the articles of the company as altered provided for payment in Australian pounds for the reasons given by Lord Wright.

Lords Tomlin and Russell delivered judgments which proceeded on the same lines as that of Lord Warrington.

Lord Wright held that the English pound and the Australian pound were different, but that the *lex loci solutionis* (Australian law) governed the meaning of the word "pound".

The *Baarn* (Case No. 8) is another case which arose out of the depreciation of foreign currency. An English court, in giving judgment for a sum of money, is obliged to express it in sterling, and therefore to effect a conversion, where the claim arises out of transactions in other currencies, and the English rule is to adopt, in the case of a judgment in respect of a debt, the date when the debt should have been paid and, in the case of a judgment for unliquidated damages for tort or breach of contract, the date when the wrong was done or expenses incurred, as the date whose rate of exchange must be taken for the purposes of the conversion. Where, however, there is a debt for a sum in a foreign currency and the necessary amount (i.e. including anything due by way of interest) is tendered in the foreign currency before judgment, the tender will operate as a discharge, although the currency has fallen in the interval between the proper date of payment and the tender and consequently the value of the amount tendered is less than the value of the amount for which judgment would have been given if no tender had been made. These two apparently inconsistent principles are explained by the fact that the rise or fall in the value of a currency is regarded as a factor extraneous to both parties, and the gain or loss resulting from it is left to fall on one party or the other without any consideration being given to their respective merits. The conversion, where it is made, has nothing to do with any view as to where the effects of a depreciation of currency

should fall, but is solely due to the technical rule that an English court cannot give a judgment for money expressed in a foreign currency. The *Baarn* illustrates these principles but, apart from questions arising as to the effect in Chilean law of deposits paid into court there, the only new point decided was that a claim for damages in tort is in principle a claim for unliquidated damages, although it may in fact consist in ascertainable expenses incurred in a foreign currency, and consequently it is not possible (as it is where the claim is for a debt) by tendering before judgment the amount in the foreign currency, to create a defence to the claim and avoid the conversion into sterling as at the date when the expenses were incurred—a course which may be advantageous to the defendant where the foreign currency has been falling since that date.

Case No. 8. The Baarn. [1933] P. 251. Langton J. and C.A.

The plaintiffs were a Chilean company and owners of the *Bio Bio*, a Chilean steamship. The defendants were a Dutch firm and owners of the *Baarn*, a Dutch steamship. On August 15, 1931, the *Baarn* collided with the *Bio Bio* when the latter was lying at anchor in the territorial waters of Ecuador. In September 1931 the necessary repairs to the *Bio Bio* were effected in Chile, and in January 1932, when the *Baarn* was in a United Kingdom port, the plaintiffs took out a writ *in rem* against the vessel, claiming damages in respect of the collision, and the defendants appeared and put in bail to obtain the release of the vessel. The defendants admitted liability and their admission was filed and the matter was referred, by consent, to the Registrar to assess the amount of the damages, and on March 17, 1932, the plaintiffs filed their claim, which consisted almost entirely of the expenses incurred in Chilean pesos in respect of the repairs effected in Chile. When, on October 14, the plaintiffs applied for a day to be fixed for the arguments on the amount of damages to be heard, the defendants contended that this was now unnecessary as they had in the interval discharged their liability by payments made in Chile. The defendants had, in June 1932, tendered in Chile to the plaintiffs a sum in Chilean pesos somewhat in excess of the costs of the repairs which had been effected in Chile (so as to allow for interest since September 1931), and, on that tender being refused because of the fall in the value of the peso between September 1931 and June 1932, they had gone to a Chilean court and had deposited this sum in a bank in Chile in accordance with the direction of the court. The plaintiffs had objected to this deposit and to the jurisdiction of the Chilean court to give this direction, but their objections to the jurisdiction were overruled. By order of Langton J. a date for the reference was fixed but the defendants were permitted to raise their plea of payment by way of motion.

On this motion it was *held* by Langton J.:

(1) That the fact that an order of the court had been made for a reference to assess the damages, in no way prevented the defendants from setting up a plea of payment, and the question therefore was whether what the defendants had done in Chile constituted a valid plea of payment.

(2) That the liability of the defendants for the costs of the repairs effected in Chile was for a sum in pesos and could, *prima facie*, be discharged by the payment of this sum in pesos in Chile, the fall in the value of the peso in relation to foreign currencies in the interval being a circumstance which did not affect their rights in this respect. (*Société des Hotels Le Touquet Paris-Plage* v. *Cummings*, [1922] 1 K.B. 451.)

(3) That as this payment by deposit was made in Chile, it was necessary to ascertain whether it was a valid payment by Chilean law and on the evidence of the Chilean lawyers produced before him, this deposit must be held to be a good payment by Chilean law.[1]

[1] The evidence given in another unreported case, *Beche* v. *The Chilean Stores, Ltd.*, shows that this conclusion on Chilean law is not correct. A Chilean judicial decision allowing a deposit is not a decision that the amount deposited is a discharge of the debt: it is only indisputable evidence that the tender of this amount has been made.

(4) That, consequently, the defendants' plea of payment must succeed.

On appeal to the C.A., the plaintiffs contended that the principle relied upon by Langton J. in (2) above did not apply in this case where the claim was not for a debt but for unliquidated damages, and in such a case the damages must be measured in sterling at the rate of exchange for pesos prevailing at the date when the pesos were lost (i.e. paid away) (*The Volturno*, [1921] 2 A.C. 544), i.e. at the rate of exchange of September 1931—a much larger sum in sterling than the sum tendered in pesos in June 1932 calculated in sterling at the rate of exchange of that date.

Held by the C.A.:

(i) That there was no decision by the Chilean courts that the sum deposited in pesos was a sufficient payment and it was not proved that this sum was a valid payment by the law of Chile.

(ii) That the claim was one for tort and for unliquidated damages and not one for each item of the claim as a debt, and the rule was that damages in tort must be assessed in sterling as at the date of the wrong and not at the time of payment (*The Volturno*), and the various items of damages, if consisting in expenses in foreign currency, must be converted into sterling at the date the expenses were incurred and not at the time of judgment. The principle laid down in the *Le Touquet* case applied only in cases where the claim was one for a debt (i.e. a liquidated sum) in foreign currency and where the exact sum owed was paid before judgment was given.

Case No. 9 (*The Russian and English Bank Ltd.* v. *Baring Bros.* No. 2 (1933 W.N. 286)) adds a further point to those decided in the *Russian Bank* cases which were reviewed comprehensively in the last number of the *Year Book*.[1] By the judgment of Eve J. given in 1932 it had been held that this Bank had ceased to exist as a juristic person under the law of the country of its incorporation; that it had, therefore, ceased to possess any corporate existence in the United Kingdom, although it had a branch there; and that consequently an action brought in its name must be stayed, as an action could not be brought in the name of a non-existent person, but Eve J. gave liberty to the parties to make a further application in this action. In the same year it was decided by Bennett J. that a winding-up order should be made in respect of the business and assets in the United Kingdom of the dissolved Bank, and a liquidator was accordingly appointed. In 1933 an application was made, under the liberty granted to the parties by Eve J., in which it was contended by the persons responsible for bringing that action in the name of the Bank, that the stay on that action should now be removed and that the action should now be allowed to proceed on account of the winding-up order, which had been made. This application was rejected by Bennett J. on the grounds that the effect of the original decision of Eve J. was that the action was dead because there was no party to bring it; the making of a winding-up order did not recreate the Bank as a juristic person, and though no doubt some applications could now be made in the name of the Bank in order to render it possible for it to be wound up, it could not now be claimed, in the name of the plaintiff Bank, that it was a party to an action which terminated in 1932.

Case No. 10 affords another instance where the English courts have held void a judgment obtained against a foreign corporation, which had been declared non-existent by the law of the country of its incorporation. The Corporation was in this case a Chilean one, and the effect of a Chilean decree was to declare that it had never had a *de jure* legal existence although previous decrees had declared it duly incorporated. A new point, which is brought out in this judgment, is that a fresh action can be brought to obtain a declaration of nullity when it is alleged that a previous judgment has been obtained by or against a non-existent corporation.

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[1] *B.Y.B.*, 1933, p. 183.

Case No. 10. Burr and Others v. *Anglo-French Banking Corporation*, 49 T.L.R. 405 (Swift J.)

By certain Chilean decrees (No. 2,100 of March 20, 1931, and No. 2,827 of April 22, 1931) the articles of a proposed Chilean Corporation, the Compañia de Salitre de Chile (which was to constitute a merger of most of the interests in Chilean nitrates and to exercise a monopoly of that trade) were approved and the Corporation was declared to be legally constituted. (A previous law (No. 4,862 of 1930) had been passed contemplating the creation of this Corporation and authorizing the Chilean Government to take part in its promotion and to participate financially in it.) The Compañia then acquired properties and incurred liabilities, but on January 2, 1933, after a change of Government in Chile, a further Chilean decree was issued, by which decrees Nos. 2,100 and 2,827 were repealed and declared to have been without effect, and three liquidators were appointed to wind up the affairs of the Compañia. (The validity in Chilean law of the decree of 1933 was not contested before the English court.) On January 19, 1933, the Anglo-French Banking Corporation obtained in the English courts a judgment against the Compañia de Salitre de Chile.

In this action the plaintiffs, the liquidators, claimed a declaration that this judgment was null and void as having been obtained against a corporation which had not then and never had any legal existence, and an injunction against the Anglo-French Banking Corporation prohibiting them from taking any steps to enforce this judgment.

Held by Swift J.:

(1) That there was authority to show that an action can be brought to obtain a stay, or a declaration of nullity, of a judgment on the ground that it was obtained by fraud or that fresh material evidence has been obtained since the judgment, which could not have been previously procured, and the same remedy should be available in the analogous case where it was claimed that the defendant possessed no legal existence; such an action is not in the nature of an appeal against the previous judgment, but of a new action.

(2) That under the law of Chile, the place of its alleged incorporation, the Compañia de Salitre had not on January 19, 1933, and never had had a *de jure* existence as a corporation, but a *de facto* existence only, and that therefore any judgment obtained against it was null and void.

(3) The plaintiffs were entitled to the declaration which they sought.

In Case No. 11 it was necessary for the purpose of deciding questions arising out of the charge on German property created under the Treaty of Versailles (as it often is also for the purposes of the application of Private International Law rules) to assign a locality to a particular kind of "chose in action", namely an insurer's right to exercise rights of action possessed by the insured to recoup himself for losses paid under the assurance. The particular point decided was that the case was governed by the ordinary rule that the place where the claim should be enforced (i.e. the residence of the person against whom it lies) is the situation of the "*chose in action*", and the situation of the documents necessary to establish the claim is immaterial, and apparently this is so even where the claim is on a Bill of Exchange or other document whose delivery may pass the title to the claim.

Case No. 11. Sutherland v. *The Administrator of German Property*, 49 T.L.R. 318 (Clauson J.); 50 T.L.R. 107 (C.A.).

In 1912 the s.s. *Mount Oswald*, a vessel owned by persons in the United Kingdom, was lost with all her cargo on a voyage from Baltimore, U.S.A., to Hamburg. Part of her cargo which had been shipped at Baltimore for delivery at Hamburg under B/L signed by the captain on behalf of the vessel's owners (or possibly charterers), was insured by the New York branch of the M.I.C., a German insurance company,

and the M.I.C. before November 1918 paid the losses due under the policy, and became, by subrogation, entitled to the rights of the owners of the cargo against the shipowners under the contract of carriage, and received in the United States the B/L and subrogation letters. Various claims were made in and after 1918 against the shipowners in respect of the cargo lost in the vessel, including a claim in respect of the cargo insured by the M.I.C. These claims led to proceedings in the courts of the United Kingdom, and it was decided in a test action that the shipowners were liable as having sent an unseaworthy ship to sea and could not claim the protection of the B/L even if they were signed on behalf of the owners. The claim in respect of the cargo insured by the M.I.C. was compromised at a sum of £4,538.

The Administrator of German Property of the United Kingdom claimed that this sum was a property, right or interest situated in the United Kingdom at the date of the coming into force of the Treaty of Versailles (January 10, 1920), and belonging to a German national (the M.I.C.) and therefore subject to the charge created by the Treaty of Peace Order in Council in accordance with Article 297 of the Treaty and the Annex to Section IV of Part X, and this sum was paid to him by the shipowner.

The plaintiff was the Alien Property Custodian of the U.S.A., and under United States law, as from November 18, 1918 the property, rights and interests situated in the U.S.A. and belonging to the M.I.C. became vested in him, and the B/L and subrogation letters relating to this cargo were on that date seized by him as part of the property of the M.I.C. He claimed that the right of action against the shipowners which the M.I.C. acquired, and which fructified in the payment of the £4,538, was a right of the M.I.C. situated in the U.S.A. at that date, that it had then passed to him, and consequently was not in January 1920 a right or interest of a German national or a right or interest situated in the United Kingdom, and therefore was not subject to the charge created in the United Kingdom over German property situated there by the Treaty of Peace Order in Council. On these grounds the plaintiff claimed a declaration (i) that this sum of £4,538 was not subject to the charge created by the Treaty of Peace Order in Council, and (ii) that he was entitled to this sum.

Held by Clauson J.:

(i) On November 18, 1918, when the property and interests in the United States of the M.I.C. became vested in the plaintiff, the M.I.C. possessed an equitable right as against the owners of the insured cargo to have the advantage of the right of action which those cargo owners had against the shipowners to the extent that it was necessary in order to recoup them for the amounts paid under the insurance to these cargo owners.

(ii) The right accruing to the M.I.C. by subrogation might be considered as possessing *either* the character of a *chose in action*, in which case, under the general rule, it must be considered as being situated in the country where it was properly recoverable or enforceable, namely in the United Kingdom, because the shipowners who were liable were there, *or* the character of an equitable interest, in which case it must be considered as being situated in the country where the fund was out of which it must be met, and on this analogy the fund was the cargo owners' claim against the shipowners and it was situated in the United Kingdom. Therefore this right was one situated in the United Kingdom. The right was not one which passed by delivery of the B/L and subrogation letters and therefore could not be held to be situated in the United States because these documents were situated there, on the analogy of documents of title whose mere delivery passes the title to the goods or rights they represent.

On appeal to the C.A. *Held:*

That the right of the M.I.C. was a chose in action which must be regarded as being situated in the United Kingdom because that was the country where the person against whom the claim was made was residing and where in consequence the chose

in action was recoverable. The B/L was not the claim, but at most necessary evidence in proof of the claim, and its situation did not determine the situation of the right (following an unreported decision of the C.A. in the *Administrator of German Property* v. *Russian Bank for Foreign Trade* in the case of a claim on a Bill of Exchange).

The *St. Joseph* (No. 12) deals (*a*) with the relationship (implied contract) between a carrier by sea and the consignee of the goods carried, which is created by the delivery of the goods to the latter in return for the Bill of Lading when the property in the goods has already passed to the consignee before shipment and he is not a party to the contract of carriage; and (*b*) with the question what law governs this relationship where the Bill of Lading is issued in one country (Belgium) and the delivery of the goods takes place in another (Guatemala) and there is no express provision in the Bill of Lading to the effect that it is governed by any particular law.

In this case it was held that the law of Belgium did not apply and that the shipowner could not limit his liability as against the consignee by relying on provisions of Belgian law applying the 'Hague Rules'. This case may be compared with the *Torni* (discussed in the last number of the *Year Book*, p. 193) where the application of the Hague rules was also in question. It deals with a point left open by the Court of Appeal in the *Torni*, where, however, the facts were somewhat different.

Case No. 12. The "St. Joseph", [1933] P. 119 (Bateson J.).

The plaintiffs, the Government of Guatemala, under a contract dated January 15, 1929, purchased from the O.G.A., a French firm of aeroplane and munition manufacturers, certain aeroplanes and equipment, and the O.G.A. undertook responsibility for the packing, insuring, and transport of the goods to Guatemala City, including their discharge at Puerto Barrios, where the goods were to be delivered to the plaintiffs. The goods were inspected before departure on behalf of the plaintiffs, who accepted them. Payment was to be made to the O.G.A., on the delivery of the goods to the plaintiffs at Puerto Barrios, by the Paris Branch of the A.S.A. Bank out of a credit opened by the plaintiffs.

On April 30, 1929, a charter-party in the English language was entered into between the defendants, a Norwegian firm, the owners of the s.s. *St. Joseph*, a Norwegian vessel, and the A.M.J.S. of Antwerp, acting as agents for the O.G.A., for the conveyance of the goods from Antwerp to Puerto Barrios, and the goods were duly shipped at Antwerp under Bills of Lading (also in English) dated May 19, 1929, to the order of the plaintiffs and made out in triplicate, of which two copies were handed to the A.S.A. Bank in Paris with instructions to deliver one to the plaintiffs on the arrival of the *St. Joseph* at Puerto Barrios, and the third was entrusted to the master of the *St. Joseph* to be forwarded to the branch the of A.S.A. Bank in Guatemala City as soon as the *St. Joseph* arrived at Puerto Barrios. The goods were unloaded on July 5, 1929, at Puerto Barrios and found to be seriously damaged through bad stowage. The plaintiffs received from the A.S.A. Bank the Bill of Lading and shipping documents and took delivery of the goods at Puerto Barrios.

The plaintiffs now sued the defendants for the damage to the goods. The defendants admitted liability but contended that the amount of damages was limited by Article 91 of the Belgian Code of Commerce, which embodied the "Hague Rules"[1] and provided that:

"A negotiable Bill of Lading issued for the transport of goods by any ship of any nationality departing from or destined to a Belgian port is governed by the following rules:

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[1] i.e. the rules drawn up at Maritime Law Conferences in 1922 and 1923 and included in the International Convention for the unification of certain rules relating to Bills of Lading signed at Brussels in August 1924.

. . . (5) Neither the carrier nor the ship shall in any event be held responsible for loss or damage, caused to or in connexion with goods, for a sum exceeding 17,500 francs per package or unit unless the nature and the value of such goods has been declared by the shipper before shipment and this declaration has been inserted in the Bill of Lading."

Other provisions of this article provided (*a*) that these rules applied only to a contract of carriage evidenced by a Bill of Lading or by any similar document of title for carriage of goods by sea, including a Bill of Lading or similar document issued by virtue of a charter-party, from the moment that such Bill of Lading or document governs the relations of the carrier and the holder of the Bill of Lading, and (*b*) that every Bill of Lading issued under the above conditions should contain an express statement that it was governed by the rules embodied in Article 91.

The defendants contended that these rules embodied in Article 91 applied because the contract was governed by Belgian law as the goods were shipped in Belgium and the charter-party was signed there (the *Torni*, [1932] P. 27 and 78: *B.Y.B.*, 1933, p. 193) and, by both English and Belgian law, the Bill of Lading regulates the rights of the parties from the time it gets into the hands of third parties.

The plaintiffs contended that Belgian law did not apply on grounds similar to those adopted in the judgment of Bateson J.

Held:

(*a*) That the property in the goods passed to the plaintiffs in France before shipment, and the plaintiffs did not acquire any property by reason of the consignment or indorsement of the Bill of Lading.[1]

(*b*) That the charter-party between the O.G.A., a French firm, and the defendants, a Norwegian firm, was the contract under which the goods were shipped, and the Bills of Lading *at the time they were issued* were only receipts for the goods and did not come under Article 91 of the Belgian Commercial Code. They would not come under it *afterwards* unless there was a transfer of the property in the goods by the negotiation of the Bill of Lading, which was not the case. (See (*a*) above.) The plaintiffs never bought or paid for the documents. It was not a c.i.f. contract.

(*c*) That the only contract between the plaintiffs and defendants was that created by the offer by the plaintiffs of the Bill of Lading to the master of the *St. Joseph* and by the delivery of the goods by the master to the plaintiffs in return for the Bill of Lading. These events took place in Guatemala and this contract was therefore made there. Its effect was merely to render the plaintiffs bound by the express terms of the Bill of Lading and no more.

(*d*) In the absence of any express provision in the Bills of Lading to the effect that they were governed by Belgian law, it was impossible to hold that this contract was governed by Belgian law at all and, even if it was, Article 91 of the Belgian Commercial Code would not apply for the reasons given in (*b*) above.

(*e*) The facts in the case of the *Torni* were entirely different. The Bill of Lading there was the only contract of carriage and the Court of Appeal only decided the case as against the indorsees of the Bill of Lading and left open the position of the other plaintiffs for further investigation of the facts.

(*f*) On these ground the defendants were not entitled to rely on Article 91 of the Belgian Code of Commerce in order to limit their liability.

In case No. 13, the *Provincial Treasurer for Alberta* v. *Kerr*, [1933] A.C. 710, at p. 721), the Privy Council had to consider the meaning of that well-known private international

[1] N.B. Bateson J. also stated that the plaintiffs did not come within Section 1 of the (U.K.) Bills of Lading Act 1855, but *quaere* what is the relevance of this Act in any case where no part of the transactions was governed by English law? Perhaps it is referred to by analogy in order to assist in ascertaining the position of the plaintiffs and defendants under the foreign law applicable and by virtue of the principle that foreign law is the same as English in the absence of proof to the contrary.

law maxim "*mobilia sequuntur personam*". The facts and decision of the case need not be dealt with here because they relate to the powers of taxation possessed by the legislature of a Canadian province under the constitution of Canada (the British North America Acts). The Privy Council explained that this maxim does not mean that a person's movable property is deemed to be locally situated where the owner is domiciled, but merely that their devolution on his death is governed by the personal law of the deceased.

Case No. 14 decides an important point of British Nationality Law, namely that, in spite of the Legitimacy Act 1926, which recognizes in England legitimation *per subsequens matrimonium*, a legitimated person born abroad of a British father does not on his legitimation acquire British nationality.

Case No. 14. Abraham v. *The Attorney General.* [1934] P. 17. (Lord Merrivale P. July 28, 1933.)

L.D.A. was born in London in 1863, and was therefore a British subject. He lived in Japan from 1881 onwards, though he returned to London before his death in 1927. He cohabited with a Japanese woman, M.U., and she bore him a son, B.A., in 1893. In 1905 L.D.A. married M.U. B.A. filed a petition under Section 2 of the Legitimacy Act 1926 and Section 188 of the Judicature Act 1925,[1] claiming by reason of the marriage of L.D.A. and M.U.:

(*a*) a declaration that he had become a legitimated person as from the date of the commencement of the Act by reason of the provisions of Section 1 of the Act;

(*b*) a declaration that, as a legitimated person, he must be regarded as the child of a British subject whose father was born in the United Kingdom and that consequently he was a British subject under the Act 4 Geo. II, c. 21.[2]

Held by Lord Merrivale P.:

(1) That the marriage of L.D.A. and M.U. was a valid marriage.

(2) That L.D.A. had a domicil of origin in England and that at the time of the marriage L.D.A. had not lost his English domicil of origin.

(3) That B.A. was, under Section 1 of the Legitimacy Act 1926, legitimated by this marriage and entitled under Section 2 to a declaration that he was a legitimated person as from January 1, 1927.

(4) That B.A., although legitimated as from January 1, 1927, had not in the legal sense of the term a *father at the time of his birth*, when he was illegitimate (*Shedden* v. *Patrick*, 1 Macq. House of Lords cases) and that consequently he did not come within the provisions of the Act 4 Geo. II, c. 21, and he was therefore not entitled to a declaration that he was a natural born British subject.

The next and last case is an interesting decision on the nature of an action based on an award (in this case a foreign award). It was held that an action on an award can be regarded as an action arising out of the contract containing the submission to arbitra-

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[1] Section 188 of the Judicature Act 1925 provides:

"(i) Any person who is a natural born subject of H.M. or whose right to be deemed to be a natural born British subject depends . . . on his legitimacy . . . may, if he is domiciled in England . . . apply by petition to the Court for a decree declaring that the petitioner is the legitimate child of his parents. . . .

"(ii) Any person, who is so domiciled and claims as aforesaid, may apply to the Court for a decree declaring his right to be deemed to be a natural born subject of H.M.

(N.B. Under Section 2 of the Legitimacy Act the right to petition for a declaration that he has become a "legitimated person" is not confined to persons who are British subjects or to persons domiciled in England.)

[2] "All children born out of the allegiance of the Crown whose fathers were or shall be natural born British subjects of the Crown at the time of the birth of such children respectively . . . are hereby declared to be natural born subjects of the Crown."

tion, but the alternative view, which was adopted in a case reviewed in the *Year Book* for 1928, that the award itself can be regarded as creating a new and separate cause of action was not rejected. The case arose under the Rules of the Supreme Court, with regard to the service of English writs on persons abroad which constitute the rules determining the jurisdiction, which the English court claims for itself, in cases where the defendant is not found in England. It was necessary for the plaintiff to show a breach of a contract concluded in England, and he succeeded, although the award was made abroad, because the contract containing the submission to arbitration was made in England.

Case No. 15. Bremen Oeltransport G.m.b.H. v. *Drewry*, [1933] 1 K.B. 753. (Goddard J., Court of Appeal.)

By a charter-party made in London in 1929 the defendant agreed to hire a vessel from the plaintiff company, a Hamburg firm, for two years. The charter-party contained a clause providing that all disputes arising out of the charter-party should be decided by arbitration at Hamburg. In 1931 disputes arose and, under an arbitral award duly delivered at Hamburg, it was decided that the defendant should pay the plaintiffs a sum of £20,913. The defendant failed to pay this sum and was at the time resident in France. The plaintiffs took out a writ, claiming that this sum was due under this award, and obtained leave to serve it on the defendant in France under Order XI, Rule 1 (*e*), which provides for service abroad of English writs in cases where the action is brought to enforce, rescind, dissolve, annul or otherwise affect a contract, or to recover damages or other relief for or in respect of a breach of a contract,

(i) made in England, or

(ii) . . ., or

(iii) by its terms or by implication to be governed by English law, or

in respect of a breach committed in England of a contract made elsewhere.

The defendant applied for an order setting aside the service of the writ on the ground that it was not justified under the rule because the action was brought on the award and the award was not made in England and the money due under it was not payable in England but at Hamburg.

The plaintiffs contended:

(*a*) that the claim under the award was a claim under the charter-party, which contained the submission to arbitration, and the charter-party was made in England and therefore the case came under the rule;

alternatively (*b*) that under the award the sum due was payable in London and therefore the case came under the second branch of the rule.

Goddard J. refused to set aside the service and the defendant appealed to the Court of Appeal.

Held:

(i) That the action based on the award made in Hamburg was an action arising out of the charter-party which contained the submission to arbitration, a contract made in England, the award being regarded as the working out of the original agreement containing the submission (but the court did not rule out the possibility that an action on an award might also (alternatively) be deemed to be based on an implied contract contained in the award itself—the view taken in the *Norske Atlas Insurance Co.* v. *London General Insurance Co.*, 43 T.L.R. 541; *B.Y.B.*, 1928, p. 187).

(ii) That the money due under the award was payable at Hamburg under the general principle that the debtor must seek out his creditor and pay him where the latter is to be found, there being nothing in the award to the contrary.

(iii) That therefore the second alternative (*b*) claim of the plaintiffs failed, but that the plaintiffs succeeded on their first alternative claim (*a*).

REVIEWS OF BOOKS

Académie de Droit International: Recueil des Cours, 1932. Vols. 39–42 of the series. 3,102 pages in all. Paris: Sirey.

The 25 monographs contained in these volumes are impressive evidence of the ever widening range of the materials with which the student of international law is concerned, and of the industry and acumen with which those materials are everywhere being studied. A few years ago some of the subjects which are quite properly here treated at considerable length would with equal propriety have been dismissed in a few sentences for the reason that there was then nothing more to be said about them.

Two courses, which are in a sense complementary, discuss the contribution of Anglo-Saxon countries to international law. Professor Dickinson (*L'interprétation et l'application du droit international dans les pays anglo-américains*) insists on the limitations of a national interpretation of international law, but points out its importance both as a formative influence and as an object of scientific study. He treats mainly of legislative, executive, and judicial action, while Professor Pearce Higgins (*Les contributions de quatre grands juristes britanniques*, i.e. Lorimer, Westlake, Hall, and Holland) is concerned with text-writers. Similar studies of their national contributions from the lawyers of other countries might well follow these examples.

Mr. Beckett (*Questions d'intérêt général dans la jurisprudence de la Cour Permanente*) amplifies the valuable study of the "law-making" work of the Court which he contributed to Vol. XI of this *Year Book*. M. Witenberg (*Recevabilité des réclamations devant les juridictions internationales*) shows how a technique relating to the admissibility of actions is to-day in process of being organized as a natural consequence of the creation of a regular judicial system. How profoundly the character of the system is being modified and improved under the influence of more frequent resort to judicial process will be evident to any reader of these articles.

On the historical side Dr. J. B. Scott (*Principe de l'égalité juridique*) considers the international implications of the theory and history of the American State; and Baron de Taube (*Origines de l'arbitrage international*) writes of arbitration in ancient and medieval times.

On the theory of the subject Professor Kelsen's magistral *Théorie générale du droit international public* is a highly abstract but penetrating examination of a group of problems which may be said to relate to the "validity" of international law. M. Siotto-Pintor (*Sujets de droit international*) takes a moderately conservative view on this controversial subject. M. Hostie, writing on *Quelques règles dans le domaine des communications et du transit*, bases the technical side of his essay on a consideration of such fundamental points of theory as the basis of obligation, the nature of territorial sovereignty, and the status of the individual. One wishes that he had had space to develop this side at greater length.

M. Kunz has an essay (*Article XI du Pacte*) which is opportune for its examination of the treatment (or, as he holds, the mistreatment) of this article in the Sino-Japanese dispute. Professor Stowell's course (*Théorie et pratique de l'Intervention*) challenges a discussion of his views which cannot here be entered into.

M. Blühdorn suggests (*Tribunaux arbitraux mixtes*) that it would be regrettable if the experience gained by these bodies should be lost. M. Messina describes the *Tribunaux mixtes en Egypte*. Professor Le Fur estimates recent progress towards *une communauté internationale organisée*. Three topics of recent but considerable importance are treated by M. Gascon y Marin (*Fonctionnaires internationaux*), M. Feinberg (*Pétition en droit international*), and M. Guggenheim (*Mesures conservatoires*).

Private international law is represented by M. Niboyet (*Rôle de la justice internationale en droit international privé*), who accepts the position that the subject is a branch of national law, but argues that international justice plays or may come to play a limited, but important, part in it. M. Audinet deals with *Conflits relatifs aux effets patrimoniaux du mariage*, and M. Miranda and M. Sulkowski continue the series of national accounts of the practice of private international law for Brazil and Poland respectively.

Lastly, a number of essays deal with economic and financial topics. Baron Nolde is apprehensive of the inroads made on *La clause de la nation la plus favorisée* by *tarifs préférentiels*. M. Aftalion (*Crises économiques et financières*) is not very hopeful, with our present knowledge, of a cure for recurring crises. M. Plaisant (*Protection internationale de la propriété industrielle*) describes the scope of the Bern Union with special reference to the prospective London Conference of revision. M. Grisiotti (*Banque des règlements internationaux*) contrasts the objects of the Bank as originally conceived with its present and possible future usefulness, and insists on its dependence on a more stable balance between the forces of nationalism and internationalism in the political sphere.

J. L. B.

Tratado de Direito Internacional Publico. Tomo I. By Hildebrando Accioly. Rio de Janeiro: Imprensa Nacional. 1933. pp. xx.

The Latin-American point of view on international questions is always interesting, and this work by a Brazilian author would be welcome on that ground alone. Dr. Accioly, who writes temperately and is at pains to present both sides of a discussion, has given us a very clear presentation of the attitude of the South American states towards the later developments of public international law. English readers will find much that is of value in his book, more especially in those chapters which deal with the Monroe doctrine and with the delictual responsibility of states. Dr. Accioly has devoted particular attention to recent international cases in which Brazilian interests were involved, e.g. *The Baden*, and this is perhaps the best feature of his book.

H. C. G.

The Position of Foreign States before National Courts. By E. W. Allen. New York: The Macmillan Co. 1933. xxii+354 pp. (21*s*.)

This book contains a careful and exhaustive analysis, both from the standpoint of general theory and from that of the actual practice of a number of countries, of the law relating to the immunity of sovereigns, states, and governments from proceedings in foreign courts; and as such may be heartily recommended both to the student and to the practitioner. It brings out the departures which have occurred, especially since the war, from the former strict theory of immunity, as well as the wide divergence in the practice of states in regard to this question.

These departures are based mainly (1) on the attempted distinction between the actions of states in their sovereign (or political) capacity and their private (or commercial) capacity, and (2) on a growing tendency to presume or imply a submission on the part of the foreign state concerned to the jurisdiction of the court from circumstances which would certainly not normally be held to justify such a presumption.

The weaknesses inherent in both these grounds of departure from the strict rule were discussed in an article in the *British Year Book of International Law* for 1933, and the present work serves to emphasize the need for some simple and universally applied rule. Such a rule can probably only be found in a return to the old strict rule. The present work perhaps hardly brings out sufficiently the weaknesses above referred to, especially those involved in the fact that, practically speaking, judgments given against a foreign state can never, without its consent, be enforced.

The author points out that the departures from the strict rule which have taken place, are to some considerable extent due to the economic system of the state as trader, and as sole trader, developed by the U.S.S.R. The Soviet Government is, however, in this respect, and seems likely to remain, an isolated case, on which a departure from the strict rule should not be founded.

G.

Treaty-making Procedure, a Comparative Study of the Methods obtaining in Different States. Compiled by Ralph Arnold, with an Introductory Note by Dr. A. D. McNair on constitutional limitations upon the treaty-making power. Oxford University Press. London: Humphrey Milford. (Issued under the auspices of the Royal Institute of International Affairs.) 1933. 69 pp. (4*s.* 6*d.*)

Mr. Arnold has collected a large number of useful memoranda, for the most part official, on the subject of treaty-making procedure. It is a pity that the collection is not quite complete and that the memoranda in respect of some of the British Dominions are silent on the important subject of parliamentary control over treaty-making.

Dr. McNair's introductory note deals in a masterly manner with limitations on the power of the negotiators, the limitations contained in instructions of plenipotentiaries, limitations upon the powers of not fully sovereign states, municipal limitations upon the treaty-making organs of a state, municipal limitations upon the creation of the international obligation and requirements for the application and enforcement of a treaty. If a criticism of such an admirable survey is permissible, it is suggested that his views as to the validity of treaties which have been concluded without due regard to the constitutional requirements of one of the parties are open to some question. He considers that in a case where the constitutional requirements of one party are well known, the other party should satisfy itself that action has been taken in compliance with them. Where, however, an instrument, complete and regular on the face of it though constitutionally defective, is produced to the other party, that party, if it is reasonably ignorant of the defect, is entitled to assume that the instrument is in order and to hold the former to its obligations.

Such a difference is, as Dr. McNair himself points out, hard to defend, and cases might well arise in which it was far from obvious that the constitutional requirements of one state should have been known to the other. Treaty-making is a most solemn international act and any view which might tend to result in

uncertainty whether a treaty, although ratified, has really become binding, is to be deprecated.

G. R. W.

Diplomatic and Consular Laws and Regulations. Edited by A. H. Feller and Manley O. Hudson. Published by the Carnegie Endowment for International Peace. 2 vols. 1,505 pp. ($5.)

This is a compilation of the texts of the laws and regulations of practically all the countries in the world relating to diplomatic and consular services. It includes laws and regulations relating to each country's own services and also those relating to the recognition and privileges in its territory of the diplomatic and consular services of foreign countries. It was originally prepared as part of the research in international law conducted under the auspices of the Harvard Law School in view of the possible codification of international law in the matter of diplomatic privileges and immunities and the legal status and functions of consuls.

Obviously this collection is of the greatest possible utility as a work of reference, and international lawyers of all countries may be grateful to the publishers for placing it at their disposal at what is an extremely moderate price. The completeness of the collection in regard to individual countries depends upon a factor which is beyond the editors' control, namely, the extent to which, in the case of each country, the matter is dealt with by special laws and regulations, as opposed to being dealt with either as part of the general law (as, for instance, in the United Kingdom where diplomatic privilege is largely a matter of common law) or by merely executive action in the form of consular instructions. It would obviously be impossible, unless a series of volumes approaching the length of Halsbury's *Laws of England* were to be produced, to include the voluminous consular instructions issued by the Foreign Offices of different countries. It is for this reason that the information available in this connexion with regard to the United Kingdom is less complete than that provided in regard to a number of other countries.

E.

Fontes Juris Gentium. Series B, Sect. I, Tom. I, Pars I, Fasciculus II (xxi+548 pp.), and Pars II, Fasciculi I (xv+400 pp.) and II (xviii+390 pp.). Digest of the diplomatic correspondence of the European States, 1856–71. By A. N. Makarov and Ernst Schmitz, under the general editorship of Viktor Bruns. Berlin: Carl Heymanns Verlag.

Three fasciculi have been added to the *Fontes* since the last notice of the work in the *Year Book* of 1933. They conclude the extracts from the correspondence of the period 1856–71. The general plan of the series has already been described in the *Year Book* of 1932.

J. L. B.

Die Zuständigkeit internationaler Gerichtshöfe. By Dr. V. von Geöcze, Budapest. 1933. Berlin: Ferd. Dümmlers Verlag. pp. 344. (RM. 17. 50.)

As explained in the preface, this is a revised edition in German of a work first published in Hungarian in 1931 and devoted to consideration of the single topic of the jurisdictional competence of international tribunals. In the absence of a code of international procedure, and the previous dearth of concrete cases, the author has performed a useful work in examining from the chosen point of view the awards of nineteenth-century tribunals, the decisions of the Permanent Court of International Justice at The Hague and of the Mixed Arbitral Tribunals created

under the various Peace Treaties of Paris 1919–20. The book is divided into three parts. No. I deals with international jurisdiction in general and enumerates the international tribunals now in existence. No. II discusses the theory of jurisdiction and especially the development of the principle that an international tribunal is entitled to determine all questions concerning its own powers. No. III deals in great detail with the jurisdiction of individual tribunals. In this part is to be found an excellent discussion of the vexed question of Advisory Opinions, as well as an excellent section, which will be new to most English readers, on the relevant decisions of the Mixed Arbitral Tribunals appointed after the war. Involved were many intricate questions of the nationality both of physical and juristic persons, notably the case of Mayer Wildermann before the German-Roumanian M.A.T. (*Recueil*, IV.482) on p.268 of this book. There is an extensive list of authorities, but unfortunately no index.

A. H. Charteris.

Force in Peace (*Force Short of War in International Relations*). By Albert E. Hindmarsh, Assistant Dean of Harvard College, Harvard University Press; London: Humphrey Milford. 1933. 249 pp. (13*s*.)

This is a short book (and brevity here, as always, is to be reckoned as a merit) on an important subject. What use of how much force is compatible with "peace" and is not prohibited by a veto on "war"? The plain man is tempted to say that if the international community is to succeed in establishing peace, "peace"must mean a real cessation of international violence, and not admit of what Dean Hindmarsh calls "war in everything but name" (a phrase which inevitably raises questions as to present classifications; what should we think of an ichthyology which allowed a fisherman to speak of "a salmon in everything but name"?). That same plain man will be impatient with the international lawyers if he finds that the rule of law after prohibiting "war" allows the continuance of armed conflict between the forces of opposing states, with the possibility of a death-roll that would have seemed extravagant to Marlborough, and of a destruction of property that would have won Attila's approval.

The earlier chapters contain a study of the history, nature, and character of reprisals in their medieval and later forms—the licence by a sovereign to a subject to help himself to damages from the ships and goods of the subjects of a state whose sovereign or subjects have done him wrong, and the Act of State by which measures short of "war" are taken by the sovereign himself. These chapters, by collecting and co-ordinating much scattered material, form a valuable contribution to the history of international law. In the later part of the book, the author discusses the position of reprisals under the Covenant of the League and the Pact of Paris, and reaches the conclusion that neither of these instruments forbids the resort to anything which falls short of "war" in the sense of a state of armed conflict, usually international, conducted *animo belligerendi*. This is a disquieting conclusion and not every one will be prepared to accept it. Two articles of the Covenant are relevant—Articles 10 and 16. Article 10 is not discussed by the writer. It certainly forbids any measure, whether taken *animo belligerendi* or not, which involves an attack on territorial integrity. The Assembly of the League took a resolution in the Manchurian affair which amounted to a finding that this article had not been observed by Japan. Article 16 is considered at greater length; here too there are arguments against the writer's conclusion. When this article speaks of a "resort to war" contrary to Articles 12, 13, or 15, it obviously

contemplates a unilateral act by one state; such an act, if it takes the shape of coercive measures taken by one state against another, "may", as the Committee of Jurists consulted by the Council after the Corfu incident expressly declared, "be inconsistent with the obligations imposed by the Covenant, *even though it is not intended to constitute an act of war*". Dean Hindmarsh calls this answer of the jurists "diffuse and non-committal". It was certainly cautious—most legal opinions are. And the jurists were wise in recognizing that not all coercive measures, not all reprisals—not, for example, it may be conjectured, such an unaggressive reprisal as an embargo on certain exports—fall within the prohibitions of the Covenant. But the jurists' opinion is a definite acceptance of the view that something less than the creation of that condition of violent conflict which gives rise to duties of neutrality in third states may constitute a violation of the obligations of a Member of the League.

Whether action "short of war"—i.e. not creative of the condition of conflict conducted "*animo belligerendi*"—may be a violation of the Pact of Paris, is another question. By Article 2 of that instrument the High Contracting Parties bound themselves that the solution of all their disputes and conflicts "of whatever nature or of whatever origin they may be" should "never be sought except by pacific means". By the preamble they had declared themselves "convinced" that all changes in their mutual relations should be "the result of a peaceful and orderly process" and that a "resort to war"—a phrase from, or at least reminiscent of, Article 16 of the Covenant—ought to result in the loss of "the benefits furnished by this Treaty". Did then the High Contracting Parties leave it open to any one Signatory Power, without transgressing its obligations under the Pact, to bombard the towns and occupy the territory of another? If the answer is that they did, and that such action can properly be described, in the context of the Pact, as "pacific", the common sense, if not "*la conscience juridique*", of the general mass of mankind will feel less enthusiasm for the peace-preserving qualities of an international law which produces such a result from such an instrument.

These are points on which different opinions will be held, but the difference does not prevent a grateful recognition of the frank acceptance by the author of the bare but not always palatable truth that "uncertainty as to the attitude of the United States operates as a bar to the consummation of any practicable plan" for creating positive and world-wide obligations for the maintenance of peace (p. 165): equally it is pleasant to observe the spirit in which the author squarely faces the "larger issue" whether "the enforcement of international law and order is to be left in the hands of individual states . . . or . . . be transferred by common agreement to the world community. . . ." On this larger issue not all voices from the United States are in perfect harmony.

It remains to add that the book is preceded by a Foreword from Professor Grafton Wilson, contains the texts of the Covenant, the Pact of Paris, the chief Locarno treaty, the abortive Treaty of Mutual Assistance and the (also abortive) Protocol of Geneva, and is diversified (p. 92) by two words of Latin in one of which the printer seems to have gone astray.

J. F. W.

Lectures on International Law. By Sir Thomas Erskine Holland. Edited by T. A. Walker and W. L. Walker. London: Sweet & Maxwell, 1933. 576 pp. (30*s.*)

Sir Thomas Holland who, for many years, was Chichele Professor of International Law and Diplomacy at Oxford, had always contemplated publishing a

comprehensive book on international law based on his lecture courses, but unfortunately he died in 1926 before the completion of his work. It is this task which the learned editors of the present treatise undertook to carry out.

Professor Holland's admirable studies on international law contain matter of much permanent value and make the publication of his lectures a valuable addition to the existing library of British Classics. In particular, his profound knowledge of the literature on the subject is very well illustrated in this book, which contains many chapters with historical introductions abounding in Greek and Latin quotations. It must, however, be pointed out that such fundamental changes have taken place in the science of international law since Sir Thomas resigned his Professorship at Oxford in 1910, that it is extremely doubtful how many of the pre-war legal propositions he would have adopted in his treatise if he had been still alive at the time of its publication. The advisability of publishing in 1933 a series of Lectures delivered between 1874 and 1910 may well be questioned. In any case, the important events which have occurred in international relations since Professor Holland laid down his pen would have necessarily required a complete recasting of his lectures. The editors have attempted to do this by incorporating in the text many useful notes, and their combined efforts have resulted in many valuable additions. These additions, however, do not bring the work up to date or render the notes in any sense complete. The chapter dealing with the present régime of marginal seas may be mentioned as one instance of many important omissions. The resolutions adopted by the Institute of International Law in 1894 on the question of territorial waters have been fundamentally revised at the Stockholm Conference of the Institute in 1928, but no mention of this fact is made in this edition. Again, the work on arbitration of the Pan-American Union did not stop in 1907—as the book would lead one to believe—but continued in the intervening years notably at the Habana Congress of 1928. It is also obsolete at the present time to talk of diplomatic representation between sovereign nations being based on a "State right quasi ex-contractu". Nor is the excellent work of Satow on this matter ever referred to either in the text or the notes embodied in this edition. The book follows the pre-War practice of devoting more space to the subject of war and neutrality than to peace, and the short notes on the League of Nations, the Permanent Court, and the Paris Peace Pact of 1926 do not appear to do full justice to the important organizations which have been set up by states since 1920 for the peaceful settlement of international disputes.

C. John Columbos.

The World Court 1921–34. By Manley O. Hudson. Boston: World Peace Foundation. 1934. vii+302 pp. ($2.50.)

Professor Hudson has revised and brought up to date (January 1, 1934) his handbook on the Permanent Court of International Justice. The last edition appeared in 1931.

Judicial Aspects of Foreign Relations. By Louis L. Jaffe. Cambridge, Mass.: Harvard University Press; London: Humphrey Milford, Oxford University Press. 1933. viii+278 pp. (15*s.*)

This is the sixth volume of the series of Harvard Studies in Administrative Law, and is concerned with the attitude taken by municipal courts when deciding cases which involve foreign relations, and in particular the recognition of foreign

Powers. With the object of showing that there is no inherent necessity and no consistent body of authority binding the judiciary to defer to the wishes or attitude of the executive, the first part of the book is devoted to a survey of some of the questions involving international relations with which courts have had to deal. Then, from an analysis of the theory of recognition, which leads him to the conclusion that recognition is unnecessary to international personality, the author passes to the practice of recognition, where he pays particular attention to the peculiar situation which until recently existed between the United States and the U.S.S.R.

In the remaining two sections of the book, dealing respectively with non-recognition, and recognition, and the courts, numerous cases in which these factors affected the issue are discussed. The author vigorously supports the critics of the notion that non-recognition implies legal non-existence, and argues that judges should not be deterred from taking account of facts by the fear of "embarrassing" the executive.

Whether or not he is convinced by the author's interesting arguments, the reader will at least find in this book many acute comments on the relevant English and American cases, and on the views of other writers on the problems of recognition.

P. L. B.

Jurisdiction and Recognition in Divorce and Nullity Decrees: The International Position. Edited by William Latey, Barrister-at-Law. London: Sweet & Maxwell. 111 pp. (5*s*.)

The International Law Association appointed a committee to consider this question, and, as material, a questionnaire was drawn up and submitted to competent lawyers in nearly every country, including many individual British colonies. These lawyers returned answers to the questionnaire, stating the law and practice of their respective countries on these points, and this little book is a reproduction from the Report of the Conference of the Association held in 1932 at Oxford, containing the questionnaire and the different answers. The present writer notices that Japan is given as one of the countries where divorce can only be effected by judicial process. This information does not correspond with information received by him from another source, which is to the effect that, under Article 808 of the Civil Code of Japan, divorce by mutual consent can be obtained without any judicial process. The position is the same in China, but that country was not included in the scope of the Association's inquiries.

E.

The Function of Law in the International Community. By H. Lauterpacht. Oxford University Press. pp. 469+xxiv. (25*s*. net.)

This is an interesting, learned, and earnest work designed to demonstrate that international law, rightly understood and applied, is capable of covering the whole field of international relations. The author brings a wealth of argument and illustration to the task; and he examines the history of international arbitration and the various theories of international publicists with great thoroughness and acute juridical analysis. But valuable as the volume undoubtedly is as a storehouse of information, and also, in many respects, as an armoury of sound arguments, the main thesis does not convince the writer of this review. Notwith-

standing the elusiveness of the distinction between so-called justiciable and non-justiciable disputes and the misuse which has been made of it on innumerable occasions, it is difficult to resist the conclusion that there are certain issues in the affairs of states which they cannot reasonably be asked to submit for binding decision to a judicial or arbitral tribunal.

True every dispute *can* be decided by the application of law. If, however, the conventional and strict view of law be taken, Dr. Lauterpacht frankly and fairly recognizes that substantial injustice may follow; he therefore appeals to those general principles which underlie the positive rules, and maintains that judicial reason and discretion are capable of evolving out of them criteria which will dispose of any given case agreeably to the enlightened conscience of men. This may be so, but one fundamental difficulty is the uncertainty, in practice, of the result. If states are to submit matters of life and death to a third party for decision they must at least be able to know in advance with reasonable certitude and precision the actual rules and principles governing the case. The fate of nations cannot, it is submitted, be made to depend upon the discretion of an individual. But whether or not one agrees with his central thesis, Dr. Lauterpacht's book is a serious and weighty contribution to an important subject, which deserves to be read with respect and from which much is to be learnt.

A. P. F.

Folkeretten i Fredstid og Krigstid. Af Axel Möller, Dr. Juris, Professor ved Köbenhavns Universitet. Förste Del: Det normale Retsforhold mellem Stater. Anden Udgave. Copenhagen: G. E. C. Gads Forlag. 1933, 8vo. xii +366 pp.

This is the second Danish edition of the first volume of Mr. Möller's treatise on international law. The first Danish edition of this volume, which deals with normal international relations, appeared in 1925, and an English translation was published in 1931.

The second volume, which appeared in 1931, deals with international arbitration, the Permanent Court of International Justice, the League of Nations, and the Kellogg Pact.

A third Volume will follow in 1934, dealing with the law of war and neutrality.

The previous Danish and English editions have been reviewed in the *Year Book* (1926, pp. 237–8; 1932, pp. 209–11), and the great merits of this work by the distinguished Danish Professor of International Law are already well known.

The present edition is brought up to date to October 1933; ample references are made to the latest conventions and international events.

The author regrets that the collaboration of the Great European Powers has been reduced owing to Germany's resignation from the League. The whole future of international law will depend upon the possibility of strengthening the solidarity between the remaining Members of the League. But, on the other hand, a precipitate movement towards the old idea of the United States of Europe would be a source of danger to the League and its future development.

As regards the Japanese-Chinese conflict, the author says that the Members of the League in fact violated their own Covenant, by not applying sanctions to Japan, as the conditions for the application of sanctions were present.

The British Empire can, according to the author, hardly be considered any longer as a unitary state, but must be described as a federal state with a peculiar

structure; the Dominions and Ireland must be regarded as sovereign and independent states.

It is to be hoped that a new English edition of this book will soon be published.

J. JORSTAD.

La Notion du "Politique" et la Théorie des Différends Internationaux. By Hans Morgenthan. Paris: Recueil Sirey, 1933. 92 pp. (Frs. 12.)

It would need a long review to do justice to this little book, which contains some very interesting reflections on the psychology of international relationships. Written from the philosophical rather than the legal standpoint, it is in effect a monograph on the differences between justiciable and non-justiciable disputes. The author is mainly concerned to point out that few disputes at the present time are wholly devoid of legal content. Even if partly or predominantly political in character, they usually have aspects which would render it possible for an international tribunal to pronounce a legal decision capable in theory of settling the matter. Such a decision would, however, in many cases *not* settle the matter because, underlying the purely legal issues, there are political questions producing a state of "tension" between the protagonists which a legal decision would do nothing to resolve and might even aggravate (the proposed Austro-German Customs Union was a case in point). The author concludes therefore that the main difficulty to be encountered in the settlement of international disputes is not so much that these disputes are lacking in justiciability, as that legal decisions cannot settle them, and that, knowing this, the parties are reluctant to submit to a tribunal disputes (however justiciable) in regard to which political feeling is strong. It is the reluctance of states to go to court that forms the stumbling-block, rather than the fact that the dispute is not capable of judicial decision.

All this, of course, is to some extent only a restatement of the well-known fact that the great difficulty in the sphere of international relationships is not so much to find some pacific means of applying the law, as to find some peaceable method of altering it; but M. Morgenthan's treatment of the theory is novel and he deals with a number of interesting collateral questions such as the nature of the psychological factors which cause a state of political "tension" to arise on given questions.

G.

Die technischen Fragen des Küstenmeeres. By Dr. Fritz Münch. Aus dem Institut für internationales Recht an der Universität Kiel. Zweite Reihe (Sonderreihe). Heft 4: Abhandlungen zur fortschreitenden Kodifikation des internationalen Rechts. Kiel: Verlag des Instituts für internationales Recht. 1934. viii+187 pp. (M 7. 50.)

The disappointment created by the failure of the Conference for the Codification of International Law has been felt particularly by those who know of the amount of work, both official and private, extending over a period of years, which was put at the disposal of the delegates. In the report of the Second Committee appointed to study the Bases of Discussion drawn up by the Preparatory Committee with regard to territorial waters it is plainly declared that no agreement could be reached on the fundamental questions. In the absence of agreement on the breadth of the territorial sea it was felt that the work of the Second Sub-Committee concerning the rules which are to govern the delimitation of the terri-

torial sea would be of but little value. However, the conviction was expressed that it constitutes valuable material for a further study of the question. The book under review is an attempt to set out in full the technical *minutiae* contained in Bases 6 to 18 inclusive. Numerous diagrams illustrate how the line of demarcation should be drawn along the coast in general and particularly in the case of bays, estuaries, ports, roadsteads, and straits. The gist of the argument is put into equations. The author succeeds in convincing the reader of the inherent technical difficulties, and one feels tempted to agree that the task of delimiting the maritime frontiers should be entrusted to an international commission.

L. G.

Diritto Internazionale Pubblico. By Luigi Olivi, 3rd ed. by Professor Augusto Olivi. Milan: Unrico Hoepli, 1933. pp. xvi+672. (Lire 32.)

Olivi's manual on the elements of public international law has always been very popular with Italian university students owing to its compactness and clarity of expression. The present edition, which is the work of his son, is in a certain sense a new book because a great deal of the matter contained in the last edition, which was published in 1911, has now become obsolete. The method adopted has been to revise the original text and to add a final section dealing with post-war developments. The result is a very straightforward and lucid statement of the rules of public international law, and although it is elementary in character this little book is fully documented and should serve its purpose admirably.

H. C. G.

The Monroe Doctrine, 1826–67. (The Albert Shaw Lectures on Diplomatic History, 1932.) By Dexter Perkins. Baltimore: The Johns Hopkins Press. London: Humphrey Milford. 1933. pp. xii+580. ($3.50.)

This book continues Professor Perkins's study of the Monroe Doctrine which appeared in 1927, and the present volume is to be followed by two more dealing with the period after 1867. When the series is completed we should have a history of the Doctrine which will become a standard work, as Professor Perkins deals with the subject in a restrained and scholarly manner. The period witnesses the first use of the term "Doctrine" applied to Monroe's pronouncement; its first recorded date is in January 1853; formerly it was referred to as "principles" or "declarations". During the period under examination the Doctrine is called into play in connexion with Texas, California, Mexico, and Honduras. The story of the Oregon Boundary dispute is of particular interest. Polk's extension in 1845 was perhaps the most important, and subsequent Presidents and Secretaries of State expanded it in such a way that it led ultimately to the two principles of non-intervention and non-colonization being hardly distinguishable. The growth of the Doctrine as a unifying influence in American politics was not at first rapid, but Professor Perkins considers that it passed from a partisan to a national cry in the Civil War period, and by 1867 it had become a catchword.

Professor Perkins has made a valuable and interesting contribution to the diplomatic history of the United States and will cause readers to look forward with eagerness to his continuation of the development and application of what a South American President once called a "Gutta percha" Doctrine.

A. P. H.

The Unanimity Rule and the League of Nations. By Cromwell A. Riches. London: Humphrey Milford. 1933. ix+224 pp. (10*s.* 6*d.*)

This book, No. 20 of the Johns Hopkins University Studies in Historical and Political Science, is a full and careful examination of the unanimity rule in the practice of the Assembly and the Council of the League. That Article V of the Covenant does not mean exactly what it seems to say is a matter of common knowledge, and when the whole story is clearly set out, as it is here by Dr. Riches, the reader will probably be in doubt whether to admire more the remarkable ingenuity with which the rule has been circumvented when it has seemed to the majority expedient that it should be, or the wise caution which has recognized the realities of international life and kept it intact though in reserve. The story is extremely instructive, too, to the student of institutions generally, for it shows how difficult it is, fortunately, to imprison a growing body within the frame of a legal formula, even the most apparently explicit.

J. L. B.

The Spanish Origin of International Law, Part I; Francisco de Vitoria and His Law of Nations. By J. B. Scott, 1934, 288+clviii pp. Oxford: Clarendon Press; London: Humphrey Milford. (15*s.*)

In 1917 the Carnegie Foundation reprinted in the "Classics of International Law" the text of Vitoria's *De Indis et de Jure Belli Relectiones*, together with a translation by the late Dr. J. P. Bate. The present volume is uniform in binding with the "Classics", but it has not been included in the series, and its purpose is different. The first part consists of fourteen chapters by Dr. Scott himself. Of these, two are devoted to a short historical introduction, ten to a running commentary upon Vitoria's text, and the last two to a general appreciation of his "liberalism" and his permanent contribution to international law. In the appendices we come to Vitoria himself. Dr. Bate's translations of the two *Relectiones* are reprinted from the earlier volume, and in addition we are given translations, unaccompanied by the original Latin, of four more texts, the respective titles being *De Potestate Civili, De Potestate Ecclesiae, De Jure Gentium et Naturali*, and *De Bello*. Of these the first two are further *Relectiones*, extracted, like the *De Indis* and the *De Jure Belli*, from the larger collection known as the *Relectiones Theologicae XII*. The two last take the form of commentaries upon the relevant passages in St. Thomas Aquinas' *Summa Theologica* (II. ii, q. 57, a. 3 and II. ii, q. 40).

Dr. Scott's treatise, fortified by ample learning, is directed to expounding the implications of Vitoria's teaching and emphasizing its practical significance at the present time. Some such work in English was long overdue, and we may be thankful that the accident of a centenary (Vitoria died in 1533) has provided the occasion for its performance. The publication of this volume should do something to dissipate the impression, too prevalent among most students, that anything earlier than Grotius is a matter of curiosity, interesting only to specialists and antiquarians.

If the average student can be induced to read, not only Dr. Scott's commentary, but Vitoria's text, he will find that it deals with much that is of urgent importance at the present day. The arguments for and against war, the nature of title to territory, the meaning of self-defence, the problem of the "conscientious objector", the content of the laws of war, the nature and scope of inter-

national law in itself—all these are discussed, and discussed on the ground of principle. Vitoria denies that the Pope can claim temporal authority over the whole world, and he is fully aware of the consequences which follow from the absence of a universal temporal power. But the acceptance of common principles goes far to fill the gap left by the absence of a common authority. Our real difficulty to-day is that we have neither the one nor the other.

An adequate history of the law of nations still remains to be written, but Dr. Scott's work may serve to remind us that no such history can be written without a just appreciation of the work of the canonists. The publication of this volume should at least give the *coup de grâce* to the legend, which still haunts the text-books, that until recent times international law was a law only effective between Christian states. Even the judicious Oppenheim fell into this error when he asserted that "with the reception of Turkey into the family of Nations in 1856 International Law ceased to be a law between Christian States solely" (4th ed. I. 39). The error rests upon a confusion between the historical origin of international law and the scope of its application. Historically it originates with Christian writers, who in their turn based it upon Christian ethics supported by the civil and the canon law of Rome. But Vitoria makes it clear that he did not regard the Christian origin of the law as limiting the scope of its obligation. The whole of the first section of the *De Indis* is devoted to defending the title of the American Indians against their Spanish conquerors, and he ends by saying that "the conclusion stands sure, that the aborigines in question were true owners, before the Spaniards came among them, both from the public and the private point of view".

The publication of the volume on Vitoria encourages us to look forward with lively interest to the appearance of the second and third volumes. The second will deal with Baltasar Ayala and Francisco Suarez, whose works have already been reprinted with translations in the "Classics of International Law". The third volume will be devoted to an analysis and appreciation of Pierino Belli, Alberico Gentili, and Hugo Grotius. The texts of Gentili and Grotius have already appeared in the "Classics".

H. A. S.

Du Domaine d'application de la Règle "Locus regit actum". La notion de forme en droit international privé. Par Edouard Silz. Paris: Librairie Générale de Droit et de Jurisprudence. 456 pp.

This interesting work is a study of that most ancient and generally recognized rule of Private International Law (usually known in France and other continental countries, as well as in England, by this three-word Latin maxim) as applied in France upon the basis of the civil code of Napoleon, and (to a much greater extent) of customary law as developed by the jurisprudence of the courts. Its object is to determine the proper scope of the rule, and the author attacks the practice—all too frequent in judgments and by no means rare even in "doctrine" —of quoting this rule as the ground for the application of the "local law" (i.e. the law of the place where something is or has to be done) in practically all the cases where that law is applied (viz. application of the *lex fori* in matters of procedure, &c., &c.).

The rule *locus regit actum* is, M. Silz contends, a rule which only applies to questions of *form* arising in connexion with the performance or conclusion of an

"acte juridiquc" (an untranslatable exprcssion which includes both contracts and unilateral acts like wills). It is an exceptional rule, based on the practical necessities of international intercourse, and stands outside the ordinary rules for the choice of law (système général de détermination de la compétence législative). All the other numerous cases where the "local law" is applied are based on other grounds and governed by other rules for the choice of law.

Though a treatise on one rule, the book covers to some extent the whole field of Private International Law, as the author proceeds by way of elimination, with a historical summary and an explanation of his standpoint on the theory of Private International Law as an introduction. The method is in the main logical and doctrinal, but there is much discussion of cases decided in the French courts, and an English reader cannot fail to find in it much that is interesting and instructive.

E.

The Capitulatory Régime of Turkey. Its History, Origin, and Nature. By Nasim Sousa, Ph.D. 1933. Baltimore: The Johns Hopkins Press. London: Humphrey Milford. xxiii+378 pp. (17*s.* 6*d.* net.)

The abolition of the capitulatory régimc in Turkey is provoking as large a literature as its operation. Rather late in the day, jurists in many countries are examining and criticizing the system of exterritorial jurisdiction which embittered relations between Turkey and the Western Powers for 150 years. The present treatise is a full account of the régime by a learned Arab student, published originally in the series of studies in Historical and Political Science of the Johns Hopkins University. It is most carefully documented, and every page bears witness to the thorough study which the author has made of the literature, English, French, German, &c. The study, indeed, is not exhaustive, since the author does not deal with the arrangements made for the trial of foreigners in the countries detached from Turkey by the Treaty of Lausanne and placed under the mandate of Great Britain and France. He is concerned purely and simply with thc régime in Turkey, and the effect of the provisions in the Treaty of Lausanne abolishing the régime in that country. As is natural in the circumstances, he pays particular attention to the relations of the United States with Turkey, including her negotiations with the new Republic. And he has written special sections about the problems of the American missionaries in Turkey and about the Chester Concession. The book is divided into two main parts; the first dealing with the period preceding the World War, the second with the period following it. Occasionally the author leaves the cold statement of facts and lets himself get a little lyrical, as in the prefacc, where he states that out of the once mighty Capitulatory Institution "there remain only the ashes of the great fires which had been kindled for decades on Ottoman soil"; or in the conclusion, where he says that "the story presents a worthy lesson to the nations of the world: never can a system composed at the mouth of the cannon be permanent". But for the most part he is a sober chronicler. There are occasional inaccuracies of expression, as where he writes that the British Government passed the Naturalization Act of 1870 in order to avoid the trouble concerning the Ottoman subjects who were naturalized in England without the consent of the Turkish Government. There were other and more general reasons for passing that Act. It is too rather a strained analogy to refer to the European legal counsellors, who were engaged by the Turkish Government in accordance with one of the conventions attached to the Treaty of

Lausanne, as *praetores peregrini*, since they exercise no jurisdiction but are purely advisers.

The appendices, containing a translation of the first Capitulations with France of 1535, and of a number of Turkish laws and documents, add to the value of the book; and there is a bibliography extending over 20 pages.

N. Bentwich.

Air Power and War Rights. By J. M. Spaight. Second edition. 1933. London: Longmans. ix+495 pp. (25*s*. net.)

Since 1924, when Mr. Spaight's book first appeared, it has been the standard work on the law and custom of air warfare. Its success is well deserved. For Mr. Spaight is a past master of the art of presenting in readable form the fruits of really serious scholarship. He has collected, often from airmen's letters and other unpublished sources, a large repertory of stories of high adventure and hairbreadth escapes, and wherever possible he uses some actual incident of the Great War as a starting-point for a discussion of the law. One would hardly realize, without having read this book, how many new problems the advent of aircraft has introduced into the laws of war, and to how many old questions it has added a new difficulty. On all such points Mr. Spaight has something to say which is always illuminating and generally convincing. In this new edition he has taken account of the recent literature of the subject, and he has revised his own views on certain topics, particularly on bombing from the air and on the general nature of air power.

Probably these two topics are the most difficult and controversial parts of the subject of the book. Mr. Spaight is well aware of the appalling nature of the problem which air power offers to the future of humanity. "Unless air power is regulated and controlled", he says, "it will destroy civilization." But he takes an optimistic view. He not only thinks that air warfare can be regulated, but that it will have positively beneficial effects. Its coming marks, he thinks, "the end of mass slaughter"; it is destined to become the "almost bloodless surgery of forcible international adjustment". This is a forecast with which one would gladly agree if one could. The arguments in its favour cannot, unfortunately, have justice done to them in this review: they include the deterrent influence of the fear of counter-measures, the chivalry of airmen themselves, and others of undoubted weight. Aircraft, he thinks, can be induced to refrain from bombing even military objectives when to do so would involve a disproportionate loss of non-combatant life; the weight of bombs used in long-distance operations can be limited; airmen, from self-interest if not from other motives, will respect the provisions of the Geneva Gas Protocol. Yet Mr. Spaight admits that all restrictive rules of war have a breaking-point, which, he says, is reached fairly early wherever there are not absolutely overwhelming reasons making for their observance. He admits too that it is likely to be a condition of the utility of any restrictive rules that reprisals should be banned—a condition, surely, for the observance of which it will never be possible to have any real security. Even if all due weight is given to the reasons, technical and other, which lead Mr. Spaight to take this hopeful view, is it not more reasonable to believe that no proposal for the regulation of the air arm can, by itself, give any security for the future of civilization, and that its menace can be met by nothing short of an attack upon the whole institution of war?

J. L. B.

Statut et Règlement de la Cour Permanente de Justice internationale. Eléments d'interprétation. Institut für ausländisches öffentliches Recht und Völkerrecht. Berlin: Carl Heymanns Verlag. pp. 498.

The scheme of this work is to give an exhaustive survey of the constitution and procedure of the Permanent Court exclusively based upon official sources. The Articles of the Statute are set out in order and accompanied by a commentary taken from these sources, which are cited verbatim, giving under each Article its history, preparatory work, related Rules of Court, decisions both judicial and administrative of the Court itself, and any other material, such as proceedings of the League, throwing light upon the provisions under discussion. The whole is done with great thoroughness and skill and nothing appears to have been omitted, so that the book contains an exhaustive collection of authoritative material and represents a valuable contribution to the serious study of the nature and working of the Court.

A. P. F.

Untersuchungen zum internationalen Fremdenrecht. By Dr. Peter A. Steinbach. Bonn: Röhrscheid. 1931. pp. 129. (Rm. 7.)

In this monograph the learned author takes a selected number of decisions of international arbitral tribunals on questions arising out of the responsibility of states for wrongs done to foreigners and analyses them at some length. The conclusion which he draws is that such responsibility must be determined in accordance with an international standard of treatment and should not be measured by the treatment afforded by the delinquent state to its own nationals in similar circumstances. The bibliography which is annexed to this treatise will be useful to those who may have to deal hereafter with the delicate and unsettled problems arising out of claims based on a denial of justice.

H. C. G.

Regional Guarantees of Minority Rights. By Julius Stone. New York: The Macmillan Company. 1933. xi+313 pp. (15*s.*)

This is a companion volume to the author's *International Guarantees of Minority Rights*, which was reviewed in the last issue of the *Year Book*. The titles of Mr. Stone's books are apt to be somewhat wider than their contents, and while his earlier work was an account of the system of the protection of minorities under the Minorities Treaties, the present book is an equally well-informed and well-documented (and better arranged) study of the special system in Upper Silesia which was set up by the Geneva Convention of May 15, 1922, as supplemented by the Paris Agreement of April 6, 1929. Mr. Stone brings out very clearly the essential differences between the two systems. While in the procedure under the Minority Treaties, the only available remedy is the invocation of the Council of the League, in Upper Silesia elaborate regional machinery has been established on the spot, consisting of Minority Offices in the German and Polish portions of the territory, a Mixed Commission with a Swiss President, and an Arbitral Tribunal, each competent to deal in certain circumstances with complaints by members of the minority, who have further the right to appeal to the Council of the League. This produces the striking result that "Not only does the individual in this procedure have *locus standi* before a regional international tribunal and before the Council of the League, but he has it *as against the authorities of the state of*

which he is a national"; and another interesting feature of the procedure is the right, which is now well recognized, of associations to petition on bchalf of individuals of the minority whether such individuals are members of the association or not. The merits of this procedure, in Mr. Stone's opinion, as compared with that under the ordinary Minority Treaties, are its non-political operation, the opportunity which the President of the Mixed Commission possesses for using the methods of persuasion and reconciliation, and the fact that he is within reach of the best evidence in every case. The provisions by which this procedure was established will expirc in 1937, and Mr. Stone has no doubt that they ought to be renewed.

W.

Neutralization, Befriedung, Entmilitarisierung. By Karl Strupp. Published as part of *Handbuch des Völkerrechts.* Stuttgart: Kohlhammer, 1933. 441 pp. (36 marks.)

The bulk of this book is devoted to a consideration of the neutralization of Switzerland, Belgium, and Luxemburg. The diplomatic history of the neutralization of these countries is dealt with very fully with a thoroughness and learning which we have been long accustomed to receive at the hands of Professor Strupp. In regard to the present status of Belgium the author is not inclined to take a dogmatic view. He is of the opinion that in strict law Belgian neutrality continues, seeing that Holland has not given her consent to its abrogation. But, he submits, the signatories of the Treaty of Versailles are estopped from relying on the provisions of the Treaty of 1839, while Russia cannot, in view of her avowed *désintéressement* in the matter, invoke it in good faith. In the second part the author discusses the conception of neutralization; its relation to state sovereignty; its effect on the right to conclude alliances, to cede territory, and to conclude commercial treaties, including customs unions; and its compatibility with membership of the League and the signature of the Treaty for the Renunciation of War. As to the two latter instruments Professor Strupp has no hesitation in concluding that participation in them can be reconciled with the existing or any future cases of neutralization. He draws attention to the diplomatic correspondence preceding the signature of the Treaty for the Renunciation of War which expressly affirmed the continued validity of the obligations arising out of previous international instruments like the Covenant of the League or treaties guaranteeing neutrality. (*Quaere*, does the same apply to treaties concluded *subsequently* to the Kellogg-Briand Pact?) Part III is devoted to a discussion of neutralized and demilitarized areas.

The book is a monument of learning and industry which, however, has stopped short of compiling an Index. The constant use of heavy type and italics—intended presumably to assist the reader—frequently makes the book difficult to read.

H. L.

Servitudes of International Law. By F. A. Vali, Dr. Jur. (Budapest), Ph.D. (London). London: P. S. King & Son. xiv+254 pp. (12*s.* 6*d.*)

This study of international servitudes is an attempt to ascertain "whether these legal relations possess a character which justifies their separate treatment or independent existence within the study of international law", and, if so, "what is their extent, their bearing, and what their importance in international law".

Part A is mainly jurisprudential and discusses the nature of Territorial Sovereignty and of Absolute or Real Rights. Part B, in addition to a historical sketch of the introduction of the term "servitude" into international law and its later career, and a discussion of the terminology, poses the problem which the author sets out to solve.

Part C (which for my part I find the most valuable) deals with the practice of states and surveys, if not exactly "from China to Peru", at any rate from the Chinese leased territories to the Panama Canal zone, a large and varied number of actual instances of economic, political, and strategic rights exercised by one state in the territory of another; for instance, fishery rights, rights of transit, common railway stations, zones in and leases of foreign ports, transit on waterways, economic use of rivers, customs-free zones, the rights of the Vatican City, the Free City of Danzig, the Saar Territory, and certain Demilitarized Areas.

In Part D the author draws his conclusions from the practice of states and considers the "consequences of the territorial character of rights in foreign territory", and the "creation, extinction, and classification" of these rights. In this Part he shows himself to belong neither to the school of the fanatical champions of the international servitude, nor to the other school who regard the servitude concept as so valueless in international law that they are prepared to "throw out the baby with the bath water". Dr. Vali prefers a middle and more pragmatic solution, and, if I may say so, seems to me to steer a sensible course in coming to the conclusion that we are witnessing the evolution of a new concept in international law, "something intermediate between merely conventional relations and territorial sovereignty", and that at present very few definite rules regarding it are available.

In the present state of those rights which are commonly called international servitudes, what is primarily wanted is the examination and analysis of actual instances. For this reason Dr. Vali's book (particularly the 147 pages of which Part C consists) forms a valuable contribution to the literature of the subject.

A. D. McN.

Plebiscites since the World War. By Sarah Wambaugh. 2 volumes. Washington: Carnegie Endowment for International Peace. ($5.)

Miss Wambaugh, whose earlier work on pre-war plebiscites was reviewed in the fourth volume of the *Year Book*, has now written a most complete account of the plebiscites which have been held or attempted since the close of the war. The first volume contains a detailed historical account of each of the plebiscites in question, with an Appendix on the "Unilateral Consultations" held in the Dodecanese, Eupen and Malmedy, Mosul, &c., while the second volume consists of an apparently complete collection of the relevant documents. In addition to making a most exhaustive study of the documentary material, Miss Wambaugh, who has had personal experience of the subject as technical adviser to the Peruvian Government for the attempted plebiscite in Tacna-Arica, has visited all the areas in Europe where plebiscites were held, and consulted a large number of persons who were concerned with them, and the result is a book which is likely to be the standard work on the subject.

Miss Wambaugh's general conclusion is that "In spite of the contentions which have surrounded the plebiscites held under the Paris treaties, they represent a real, and on the whole a successful, attempt to apply the principle of self-

determination to a limited number of such areas. Specific, and occasionally trenchant, criticism may be brought against the conduct of all of the individual plebiscites except that in Schleswig, but even in the case of the most faulty it is apparent that the result of the voting gave a fairly accurate picture of the wishes of the inhabitants." She realizes, however, that "Better any form of paternalistic determination, however undemocratic, than a plebiscite lacking the measures necessary for the protection of both parties", and her concluding Chapter on "The Plebiscite in the Future" contains valuable suggestions as to the measures which are necessary if the plebiscite is to result in a genuine expression of the wishes of the inhabitants.

A most excellent piece of work, though its interest is historical and political rather than legal.

W.

The League of Nations in Theory and Practice. By C. K. Webster. With some chapters on International Co-operation by Sydney Herbert. 1933. London: Geo. Allen & Unwin. 320 pp. (10*s.*)

This book attempts in a short compass to give a comprehensive and impartial account of the origin and work of the League. It is divided into four parts, treating respectively of the Founding of the League, the Development of its machinery, the Organization of world peace, and the Growth of international co-operation. There are useful suggestions for further study on the subject of each chapter.

The authors do not conceal their own conviction that the introduction of the League system has marked an immense progress. At the same time they frankly admit its present imperfections. It is, they believe, still an experiment, of which the issue is not yet certain. Its hopefulness lies in the fact that there is no real alternative to the system of "obligatory conference", which they regard as the heart of the Covenant, and that what is needed for success is not any change in human nature but merely the application to international affairs of the same enlightened selfishness which has already taught men some measure of restraint and compromise in national affairs.

The book admirably fulfils the need for a short but scholarly introduction to the subject of the League, and it is particularly welcome at a time like the present when there is a tendency not only to admit but to magnify the League's past failures and future uncertainties. When every necessary qualification has been made, no fair critic can fail to recognize the solidity of the achievements which a record such as this reveals. The book is judicious in its treatment of the details of the story, which are sufficiently full, but are not allowed to obscure the main outlines of the picture; it rightly stresses the place of the League as a stage in a historical process beginning long before the war and still continuing; and it is sober in its analysis of the results so far achieved.

J. L. B.

Annual Digest of Public International Law Cases 1923–4. Edited by Sir John Fischer Williams & Dr. H. Lauterpacht. London: Longmans, Green & Co. pp. 468. (42*s.*)

This volume of the *Digest*, filling the gap left by the four preceding issues, completes the record of cases during the ten years following the end of the War. As before, the collection covers a very wide field, both as regards subject-matter

and the courts and countries concerned. Taking first decisions of international tribunals, there are, besides the important cases dealt with by the Permanent Court of International Justice in the years 1923–4, reports of the decisions of the British-American Claims Commission, the U.S.-Germany Mixed Claims Commission, the Mixed Arbitral Tribunals set up under the Peace Treaties. In addition to these the present volume contains two cases before single arbitrators, which are of outstanding interest; the case between the U.K. and Spain relating to the claims of British subjects for loss and injury sustained in the Spanish zone of Morocco between 1913 and 1921, submitted to M. Huber; and the case between the U.K. and Costa Rica arising out of acts of the revolutionary government of General Tinoco, adjudicated upon by Mr. Taft.

As regards municipal courts, 27 countries are represented by close on 200 cases. Among the mass of questions that are dealt with the following may perhaps be mentioned: A series of decisions by U.S. courts upon the special position of Russia; a number of cases from different parts of the world on questions of nationality; a group of cases as to extradition; decisions relating to the controversial subject of the relation of treaties to municipal law; the South African case of *R.* v. *Christian*, and other cases, relating to Mandates. This volume, like the last, which covered the years 1919–22, contains many decisions, both municipal and international, relating to the laws, and the effect, of war; and, in particular the historically interesting Leipzig trials of German officers accused of having violated the laws and customs of war.

The *Annual Digest* has, it may be hoped, become a permanent institution and the present issue shows once more that the work is indispensable for the study and application of international law.

A. P. F.

The Suez Canal: Its Past, Present, and Future. By Lt.-Col. Sir Arnold T. Wilson, K.C.I.E., C.S.I., C.M.G., D.S.O., M.P. Oxford University Press. London: Humphrey Milford. (15*s.* net.)

This is an invaluable text-book for every one who is interested in the future of the Suez Canal. It includes a detailed account of the history of the Canal and of the operations of the Suez Canal Company, the finances of which are subjected to a searching analysis. The author's main object is to direct attention to the future. "Is a monopolist company," he asks, "entitled to distribute huge dividends at the expense of those who make use of its services and of those whom its clients serve?" The agitation for a reduction of the canal dues, which became vocal in 1931, shows that certain circles in England hold strongly that the answer is "No". Sir A. Wilson discusses in detail the case stated against the Company and the Company's defence. There is much food for thought in this exchange and in Sir A. Wilson's views in regard to the future of the Canal. His conclusion is that to renew the concession (which expires in 1968 when, in default of renewal, the Canal will revert to the Egyptian Government) in its present form would be injurious to the interests not only of Great Britain and His Majesty's Dominions and dependencies east of Suez, but also to the commerce of Europe and Asia. The main object of His Majesty's Government, he says, is political and strategic; that of the other shareholders purely commercial; the interest of His Majesty's Government should be to ensure that the Canal does not exact more from its users than is needed to pay a fair remuneration to the shareholders; the

interest of the other shareholders is the opposite. Sir A. Wilson's ideas as to how a satisfactory settlement by agreement, which would reconcile these conflicting interests, might be achieved and the lines which it should follow merit careful study.

The book is fully documented and the bibliography excellent.

Internationales Privatrecht. By Martin Wolff. 1933. Berlin: Julius Springer Verlag. vi+159 pp. (Rm. 60.)

This text-book is worthy to take its place amongst the recent German books on private international law noticed in this *Year Book* (1933, at p. 212). The author is fully conversant with foreign doctrines of private international law and regards, for instance, the English rules of conflict of laws as "the most important in the world" (p. 17). The parts dealing with *ordre public* (§ 12), renvoi (§ 14) and the application of foreign law (§ 15) are of special interest. The author lays stress on the barrenness of general notions (*allgemeine Formeln*), seeks to ascertain the rules of conflict, "as every other rule of law, from enactments and in particular from judgments of the courts and needs of human society" (p. 17), and regards Story as "the mystery teacher of the world" (*der heimliche Lehrer der Welt*).

Professor Wolff's book is well written and can serve as a most reliable guide to the subject.

V. R. I.

De Jure Belli Libri Tres. By Alberico Gentili. Vol. I. A photographic reproduction of the edition of 1612. pp. xviii+742. Vol. II. An English translation of the text by John C. Rolfe, with an introduction by Coleman Phillipson. pp. 52 *a*+479. Oxford: The Clarendon Press. 1933. (35*s*.)

These two volumes constitute No. 16 of the "Classics of International Law" published by the Carnegie Endowment for International Peace, Division of International Law, and maintain the high standard which has been reached by their predecessors in this series. The first volume opens with a photogravure of the statue to Gentili, erected at his birthplace in San Ginesio in 1908, and contains an excellent photographic reproduction of the edition of 1612. The second volume contains an introduction by Dr. Coleman Phillipson and a translation by Professor Rolfe of Pennsylvania University, which is clear and smooth. The two volumes form a valuable addition to the library of the international lawyer, which, thanks to the Carnegie Endowment, can now contain nearly all the classical works on the origins of international law. In this volume, as in others of the series, there is a list of the *errata* which occur in the original. The translator has undertaken a work of great difficulty in tracing and, where necessary, correcting Gentili's citations and in giving in full the names of the authorities cited. Dr. Phillipson has done his work well, and draws attention to the fact that the late Sir T. Erskine Holland rescued Gentili from comparative oblivion and placed him in a position which the study of his works justifies. Dr. Phillipson points out that Gentili is the first great writer on *modern* international law and that in clearly defining his subject he effectively prepared the way for Grotius. He gives an excellent résumé of the contents of the *De Jure Belli*. He concludes that "it is unnecessary to pronounce which (Gentili or Grotius) occupies the foremost place", but that "the signal achievement of the great Dutch jurist could not have been what it was, in the absence of the forcible, reasoned, and comparatively pioneer work of the Italian lawyer".

The modern tendency of writers has been to emphasize the important part played in the foundation of international law by the great school of Spanish jurists, such as Vitoria, Suarez, and De Soto, and this has been well done, but amongst the many who wrote on the subject in the sixteenth and seventeenth centuries it is unnecessary, if not impossible, to name any one of the "Fathers" of international law. A study of the history and development of the law of nations shows the contributions of Spanish, Dutch, Italian, and English writers, and that of Gentili is certainly to be placed in the first rank.

A. P. H.

L'Organisation d'Hygiène de la Société des Nations. By H. van Blankenstein. Purmerend, Holland. 1934.

This is a most useful, close and well-documented study, but it adds little to what is already available in such more general books as those of D. H. Miller and Schücking and Wehberg or the more specialized study of Réné Lacaisse. The particular task which Dr. van Blankenstein has set himself is to make a juridical study, to investigate, for example, such matters as the legal competence of the League of Nations in regard to health. Here a non-lawyer might be tempted to accuse him of having failed to bring political acumen to assist in the interpretation of legal documents. For instance, he asserts that the clause from which the Health Committee derives its competence, namely Article 23 (f), "was only inserted in the Covenant in order to safeguard the rights of Governments against a usurpation of their functions by the Red Cross".

It is, of course, perfectly true that this fear of usurpation was felt, and that Major Astor and Mr. Philip Baker visited Mr. Miller, on behalf of the British Delegation and of the Ministry of Health, to propose alterations in the text so as to provide the necessary safeguards. But, having made that alteration in what became the Red Cross Article (XXV), there was no need for them to insist on a further provision in the Covenant that States Members should "agree to take steps for the improvement of the health of their peoples, the prevention of disease and the mitigation of suffering throughout the world" unless they wished Governments to make that undertaking. Yet they did this and in a modified form this provision became Article 23 (f). It surely is the fallacy of *post hoc ergo propter hoc* to reason as does the author. When, moreover, we remember that more than two months before the Red Cross proposal was heard of, on January 20, 1919, the revised Cecil draft proposed the creation within the framework of the League of "commissions to study and report to the League on economic, *sanitary*, and other problems of international concern, and they [the Members of the League] authorize the League to recommend such action as those reports may show to be necessary", one doubts whether the author's understanding of the intentions of the drafters of the Covenant is quite complete. One is tempted to make this type of criticism in other places, but the book is nevertheless a useful document.

H. R. G. Greaves.

Handboek van het Volkenrecht. By Mr. J. P. A. François, Extraordinary Professor of International Law at the High School of Commerce, Rotterdam. Volume II. Zwolle: Tjeen Willink. 1933. xv+793 pp.

The first volume of Professor François' treatise was reviewed in the *British Year Book* for 1932. This second volume completes the work, and contains an

Index to the two volumes. It has four long chapters. The first deals with Administration: that is, national instruments for foreign affairs, including diplomatic and consular officers, and international organs of administration, such as the League of Nations and the Pan-American Union, and the administrative subjects with which they and other international administrative organs are concerned. Chapter II deals with the settlement of disputes by legal process, whether in national or international courts, and whether by conciliation or by arbitration. Chapter III discusses means of redress (*Rechtshandhaving*), and therefore treats of retorsion, reprisals, boycott, and war, among other matters. It is not without significance that of about 1,300 pages in the two volumes, only about 360 are given to the subject of War. Nevertheless, the subject dominates the present volume. The same chapter discusses the League of Nations as a means of settling disputes, as well as other methods adopted by international co-operation. The last chapter, which is quite short, deals with claims for unlawful acts. There is in addition a short list of addenda and corrigenda for the two volumes.

Professor François' method is essentially positive, and the wide scope of his survey necessarily implies a limitation of purely theoretical discussions. But he gives ample references to literature, and the book should prove of very great use to Dutch students. Others will find it valuable for the study of the Dutch point of view on current issues of international law.

W. I. J.

REVIEWS OF CURRENT PERIODICALS

The American Journal of International Law, 1933. (Vol. XXVII.)

The January number contains a valuable short article on Boycott in Foreign Affairs by C. C. Hyde and L. B. Wehle: the subject is chiefly dealt with as a means of joint action by states. Manley O. Hudson gives an account of the eleventh year of the Permanent Court of International Justice. Quincy Wright makes a careful examination of the meaning of the Pact of Paris, in which he concludes that the legal case against war and armed violence in international affairs is complete. A. H. Feller deals with the awards of the German-Mexican Claims Commisson for claims arising against Mexico between 1910 and 1920. Of historical interest is the note by Jesse S. Reeves introductory to a translation of Etienne Dolet's "Functions of the Ambassador" (*De officio legati*) published in 1541 and believed to be the earliest printed essay on the subject.

The April number opens with an article on Japan and Jehol by E. T. Williams, which is more historical than legal, though of value to students of international relations. The draft Convention and the Conference of 1929 on the treatment of foreigners after admission is discussed by J. W. Cutler. L. L. Deere writes a useful and well-documented article on political offences in the law and practice of extradition, excluding the Latin-American States. "The State of the City of the Vatican", dealing with the sovereignty of the Pope, and its exercise in internal and external affairs, by G. G. Ireland, shows the working of the Lateran Treaty of 1929.

The July number has an interesting article by F. C. Fisher on the Arbitration on the Guatemalan-Honduran Boundary dispute which was settled by a unanimous award rendered in January 1933, which appears to have satisfied both states. Japan's mandate in the Pacific is described by E. T. Williams. Manley O. Hudson deals with the Permanent Court of Arbitration established by the Hague Convention of 1899, giving a short account of the cases heard by it. The Calvo Clause has frequently occasioned difficulties, some of which are discussed by A. H. Feller. Political arbitration under the General Act for the Pacific Settlement of International Disputes is dealt with by M. Gonsiorowski.

The October number contains a plea by John Bassett Moore for a return to law in international relations, in an article entitled "The New Isolation". He has particularly in mind the modern rejection of the law of neutrality and the attribution of a peaceful character to processes of coercion that have hitherto been considered as savouring of war. In "The Law of Nations, Static and Dynamic" J. L. Kunz urges the need of making international law responsive to the need for change. B. Akzin describes membership in the Universal Postal Union. To students of international legal questions which arose during the World War the article by E. C. Phillips on "American Participation in Belligerent Practice with regard to Reprisals by Private Persons" is an interesting chapter in the history of the law of nations.

Each number contains timely notices of current events under the heading of Editorial Comment, together with judicial decisions, valuable book reviews, and supplements containing official documents.

A. P. H.

Revue Générale de Droit International Public, publiée par Marcel Sibert. 3me Série. Tome VII. 1933. Paris: A Pedone.

The *Revue Générale* is, as usual, full of interesting material, but a good deal of it is rather of a political or historical than a legal character. Dr. Radovanovitch's long article on the Little Entente is almost entirely historical, but he finally discusses the juridical character of the Entente and concludes that it is "une alliance organisée, cohésive au plus haut degré, et apparaissant comme une entente régionale dans le sens de l'art. 21 du Pacte de la S.D.N. . . . elle se présente comme une personne distincte du droit international, de forme nouvelle, inconnue jusqu'à présent sous l'aspect d'une catégorie intermédiaire entre un groupement d'États alliés et une Confédération à liens plus lâches". Other articles whose interest is mainly political or economic are two by Professors Liais and Lhomme on the Conferences of Lausanne and Ottawa respectively.

Professor Whitton of Princeton discusses the history and development of the Monroe Doctrine. He concludes that in existing circumstances the collaboration of the United States with the nations of Europe in relation to such matters as disarmament and the prevention of war is not only not inconsistent with the Doctrine, but would constitute a "return to pure Monroe-ism". Professor Yves de la Brière discusses "L'aspect juridique du désarmement moral" with special reference to the legal responsibilities of the press and associations and to the memorandum on the subject prepared for the Commission on Moral Disarmament by Professor Pella—this memorandum is printed in full in another number of the *Revue*.

Two articles deal with Mandates, but from very different points of view. Professor Sibert of Lille considers the procedure adopted in dealing with petitions from countries under mandate unsatisfactory, and makes the somewhat revolutionary suggestion that the inhabitants of mandated territories might be allowed to institute proceedings against the mandatory Power before the Permanent Court. Professor Makowski, on the other hand, in an article on "La doctrine juridique des mandats B et C." is of opinion that the holders of these mandates acquired the sovereignty over the territories in question by right of conquest and by cession from Germany, and that the mandate, and consequently the functions of the League in connexion therewith, affect only the relations between the mandatory and the inhabitants of the territory, and not those between the mandatory and the territory itself.

Dr. Mouskhéli discusses the question of "L'équité en droit international moderne".

Professor Sibert also contributes a short article on the definition of aggression contained in the Conventions signed in London last July by the Soviet Union, most of its immediate neighbours, and the Little Entente. While welcoming its precision, Professor Sibert does not discuss the somewhat serious objections which have been raised against the definition. Dr. Mandelstam has a long and interesting article (to be continued next year) on the interpretation of the Kellogg Pact by the Governments and Parliaments of the Signatory States. In an article on "La répression des crimes et délits contre la sûreté des États étrangers", Mr. Lawrence Preuss of Michigan University reaches the conclusion that there is no "obligation d'ordre international visant à garantir aux États étrangers une protection contre toutes les atteintes visant leur sûreté, leur intégrité et leurs institutions".

Among other articles may be mentioned one by Professor Rousseau of Rennes on consuls in war time, which contains some interesting historical precedents; a discussion by Dr. Curtius of the "Structure juridique de la convention d'assistance financière"; and an article by Professor Sibert on Armistices.

W.

Journal du Droit International. Tome LX (1933).

It is, perhaps, not surprising that the last volume of *Clunet* should devote a great deal of attention to those questions of private international law which are connected, either directly or indirectly, with the economic crisis. There are several articles in which the "gold clause" problem is discussed, and all of them are somewhat polemical in character. There are also many short notes which deal with matters of taxation, and it is evident that considerable difficulty is being experienced at present by reason of the conflict of fiscal laws.

The most interesting articles from an English point of view are those by M. Arminjon and Professor Bentwich. M. Arminjon examines the award of the arbitral tribunal in the *Salem* case, which raises an interesting point as to the exhaustion of local remedies. Salem, a naturalized American, complained of a denial of justice which he alleged that he had suffered at the hands of the Egyptian Mixed Courts. The United States intervened diplomatically, but the matter was ultimately referred to arbitrators and the award rendered was in favour of the Egyptian Government. The arbitrators held *inter alia* that inasmuch as the Egyptian Government had no effective control over the Mixed Courts, it could not in any circumstances be held responsible for any denial of justice by those courts.

Professor Bentwich deals with the *Hardoon* case, which came before the British Consular Court at Shanghai. The short points were (*a*) whether a Christian could acquire a domicil in the international settlement, and (*b*) if so, whether the law applicable to the case was English law or the law of the Chaldean Community to which the *de cujus* belonged. The Court applied English law, a decision which is criticized with great force by Professor Bentwich.

Clunet keeps up its high reputation, and words of commendation are superfluous, but one cannot help being struck by the fact that it is more genuinely international than any other periodical of the class to which it belongs.

H. C. G.

Zeitschrift für öffentliches Recht, Band XIII (1933).

Six of the twenty-one articles contained in this volume are of interest to the international lawyer. Of these the most considerable is Dr. Bileski's examination of the "Development of the Mandated Territories towards Independence". His conclusion is that the principle of eventual self-government is really only applicable in the cases where General Smuts had foreseen it—the "A" mandates—and that after Iraq and Syria have achieved autonomy there is no possibility of a similar consummation in any foreseeable future. The conflict of racial interests forbids autonomy in Palestine; the "C" mandates are out of the question; while in the territories under "B" mandates, owing to the presence of superior white colonists, any steps towards self-government would actually conflict with the second principle of mandates, that their development is to be in the interests of the native population. Not that this means the failure of the system, since the international supervision, which will continue, has been shown to be real.

The Tinoco case and the case of George W. Hopkins are exhaustively considered in an article by Dr. Leo Gross on the Responsibility of States for the acts of an interim government (*Zwischenherrschaft*). It is interesting to observe the tribute paid to Austin's criticism of the terms "de facto" and "de jure" as applied to governments. Since Somlo, the Hungarian Austinian, wrote his *Juristiche Grundlehre* in 1911, it is conceivable that Austin is treated with greater respect in German literature than by his compatriots.

Dr. Kunz traces the development of the international organization of transit and communications since the Peace Treaties; Dr. Wolgast writes again (two articles) on the Greenland dispute; and Dr. von der Heydte, reviewing *in extenso* the recent work of James Brown Scott on Francisco de Vitoria and his *Law of Nations*, comments on the revived interest in the theologian pioneers, who were not merely the historical founders of the old, but are also the prophets of a new era in international law. The celebration of the 400th anniversary of the *De Judis* has certainly given stimulus to the renaissance of natural law. Positivists will be hard put to it to see that the work of Gentilis is not undone, and international law once more confused with theology and ethics.

There are, as usual, a large number of useful reviews. In future the price of the yearly volume will be RM. 68. Hitherto the price of the five separate numbers has been RM. 14 each.

B. E. K.

Niemeyers Zeitschrift für Internationales Recht. Band XXXXVII, and Band XXXXVIII (Heft I). (Redaktions- und Verlagsbüro Kiel (Kitzeberg 22). (20 Reichsmark the volume (or for later subscription 24 Reichsmark).)

Volume XXXXVII contains articles by Maurach on the civil procedure of the courts of the Soviet Union, by Hochschild on the legal aspects of the mass-expulsions (*Massenausweisungen*) from Alsace-Lorraine after 1918, which the writer finds to have been a violation of international law, and by Schwartz on the protection of minorities by the League of Nations. This last is a short but interesting article in which the writer discusses with some severity what he considers to have been the failure of the League to protect the property of the Székler in territory transferred by the Treaty of Trianon from Hungary to Roumania. And it is true that the execution of the minority treaties has not given the results that were hoped for by international lawyers.

The rest of the volume includes, as usual, a valuable collection of source documents and digests of German cases of international interest.

The first section of Vol. XXXXVIII has as its only contributed article a discussion by Dr. Hennig of Düsseldorf of certain aspects of the law relating to the navigation of "international rivers". Among the documents reprinted figures the Advisory Opinion of the Permanent Court of International Justice on night-work for women. No comment is attached.

J. F. W.

Rivista di Diritto Internazionale. Vol. XII. Rome, Societá Athenaeum. 1933.

The leading article in this volume is Professor Cavaglieri's address on "Law and Violence in International Relations", delivered at the opening of the academic session of 1933–4 at the University of Naples, which is a powerful plea for the maintenance of the rule of law in international affairs. Professor Enriques

contributes an interesting article on the juridical effect of international treaties on the rights and duties of third parties. Most of the other articles and nearly all the notes deal with questions of private international law. Attention may perhaps be directed to Professor Bosco's article on the international law of aviation, and Professor Morelli's discussion of the problems which arise when municipal law has to be modified in order to give effect to an international rule.

H. C. G.

Revue de Droit international et de Législation comparée. Tome XIV. 1933.

The articles published in the four numbers of this Review during the year are as usual of considerable interest.

Two articles deal with the subject of the exhaustion of local remedies, one by Dr. Friedmann of Helsingfors, and one by Professor Tenekides, Legal Adviser to the Ministry of Foreign Affairs at Athens. The latter maintains that international law gives no support to the existence of such a rule. The former adopts a more sober standpoint and maintains that international law has adopted a realist and not a mechanical theory on the subject. The question is one which will continue to prejudice the satisfactory solution of international claims on behalf of private persons until agreement is reached on the basic principles applicable, and therefore articles on the subject are always useful.

The discussions at the Oslo meetings of the Institute of International Law with regard to the extent of the exclusive jurisdiction of states—the "domaine réservé" referred to in paragraph 8 of Article 15 of the Covenant—lead to two articles being devoted to this subject. Professor George Scelle makes a vigorous attack on the doctrine; to him it is based on the anti-juridical notion of the sovereignty of the state. Dr. Segal of Paris furnishes a more objective study of the same subject.

Dr. Kosters of The Hague contributes an exhaustive study of the elements of international law to be found in the writings of St. Augustine. It is an essay which makes one realize how essential it is that international law should conform to the principles which humanity can endorse as being calculated to foster the general improvement of international relations.

Dr. Kassik of Estonia writes an excellent article as to the effect of the clause so frequently to be found in agreements between states, stipulating that a dispute shall have been the subject of diplomatic negotiations which failed to achieve a settlement before it is referred to an international tribunal. The author regards the decisions of the Permanent Court of International Justice as not having been sufficiently strict in requiring compliance with this clause.

Dr. Goedhuis of The Hague criticizes with some vehemence the draft Convention framed in 1931 by the International Technical Committee of Aerial Legal Experts as to the powers and duties of the Commandant of an airship or aeroplane.

The important part which the family must play in nationality questions is the subject of an excellent article by Professor Reuterskjöld of Upsala. The author points out the divergence between the views underlying the Stockholm resolutions of the Institute of International Law and those adopted at Oslo. If the sexes are to be put on a footing of equality, the family cannot play the important rôle which it used to do in the past and (*semble*) should do in the future.

A very interesting study of modern problems in connexion with the most-favoured-nation clause comes from the pen of Baron Nolde. He criticizes the conclusion of the League of Nations Commission for the Progressive Codification

of International Law that nothing could be done on this subject, and describes the modern developments as regards most-favoured-nation clauses since the war. Unfortunately, the economic blizzard of the last few years has led to the introduction of restrictions on importations, such as quotas, &c., which evade the operation of the clause and will perhaps prevent its ever recovering its pristine importance.

Professor Charles de Visscher writes on the nature and sources of international law. The latter pages of this article which deal with the interpretation and application of the final clause in Article 38 of the Statue of the Permanent Court of International Justice as to the settlement of cases "ex aequo et bono" are very interesting.

Other noteworthy articles are a learned and instructive discourse by Professor Burckhardt of Berne on the "Clausula rebus sic stantibus" in international law; an article by Boris Shatzky on reserves in treaties, well illustrated by numerous examples taken from particular treaties to which parties have endeavoured to attach reserves; and a suggestion by Dr. Pierre Wigny in favour of a transactional rule as to the law applicable to a contract in case of conflicts of law.

The reviews of books and other international law publications are as usual excellent.

C.

The Journal of Comparative Legislation and International Law. Vol. XV. 1933. Edited by F. M. Goadby, D.C.L.

Though the *Journal* has acquired a new editor, the interest of its contents has not diminished. Unfortunately the Annual Report shows a considerable loss of income, owing to the financial depression. This appears to render impossible a development which many would like to see—the increase to four of the numbers of parts devoted to articles, notes, and reviews.

Of the twenty-one articles in the volume for 1933, three are devoted to international law, twelve to comparative law, five to British public law, and one to Jurisprudence. Seeing that the *British Year Book of International Law* caters for the international lawyer, and the *Law Quarterly Review* for the English private lawyer, this emphasis upon comparative law and public law is welcome. The fact that Jurisprudence has been almost entirely ignored is probably due to the lack of possible contributors and not to any deliberate policy.

Most of the articles are excellent. Any preference must largely be determined by the reviewer's own interests. With that qualification, special mention may be made of an essay on "The Equality of Status of the Dominions and the Sovereignty of the British Parliament" by a South African, Dr. H. ver Loren van Themaat; of an essay on "English Law in the Dutch Courts" by M. I. Mesritz; and an essay on "The Law of Torts in Denmark" by H. Holm-Nielsen. Professor Keith's "Notes on Imperial Constitutional Law" are, of course, regularly studied by those concerned with constitutional problems.

A word should be added about the reviews. Many of these are especially valuable, partly because of the competence of the reviewers, and partly because many books are mentioned which are not referred to in other English periodicals. This is a feature which should be developed. We should like to see greater attention paid, for instance, to the important literature on Jurisprudence which is now being published on the Continent, especially in France.

W. I. J.

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(In this Bibliography the following abbreviations are used: Acad. dip. int. = Académie diplomatique internationale; Acta Scan. = Acta Scandinavica Juris Gentium; A.J.I.L. = American Journal of International Law; B.Y.B. = British Year Book of International Law; Grot. Soc. = Grotius Society Transactions; H.R. = Recueil des Cours, Académie de Droit International de la Haye; J.C.L. = Journal of Comparative Legislation and International Law; J.D.I. = Journal de Droit International; J.I.L.D. = Journal of International Law and Diplomacy; L.Q.R. = Law Quarterly Review; Niemeyers Z. = Niemeyers Zeitschrift für internationales Recht; Rev. de der. int. = Revista de derecho internacional; Rev. de dr. int. = Revue de droit international; Rev. de dr. int. et de lég. comp. = Revue de droit international et de législation comparée; Rev. de dr. int., de sci. dip. et pol. = Revue de droit international, de sciences diplomatiques et politiques; Rev. Gén. = Revue générale de droit international public; Riv. di dir. int. = Rivista di diritto internazionale; Z. f. aus. int. Privatrecht. = Zeitschrift für ausländisches internationales Privatrecht; Z. f. aus. öff. R. u. V. = Zeitschrift für ausländisches und öffentliches Recht und Völkerrecht; Z. f. V. = Zeitschrift für Völkerrecht.)

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